

No. 17511

In the

United States Court of Appeals  
*For the Ninth Circuit*

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OWENS GENERATOR COMPANY, INC., a de-  
funct New Jersey corporation, et al.,

*Plaintiffs-Appellants,*

vs.

H. J. HEINZ COMPANY, a Pennsylvania cor-  
poration,

*Defendant-Appellee.*

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Brief of Appellee H. J. Heinz Company

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## Brief of Appellee H. J. Heinz Company

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Appellants' brief is a mixture of candor and obscurity. It is candid because, appealing from a judgment of dismissal for defendant H. J. Heinz Company (hereafter called Heinz) entered on motion for summary judgment, appellants "concede that there is no genuine issue as to any material fact" (Br. 5).<sup>1</sup>

It is obscure because appellants describe their claim against Heinz as an effort to "impress a constructive trust upon converted assets" of a defunct New Jersey corporation (Br. 1), asserting that

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1. References to Appellants' Opening Brief will be by the designation "Br."

All emphasis in the present brief has been added unless otherwise noted.

Heinz is a "constructive trustee \* \* \* for all losses its conduct may have occasioned [the defunct company] and for all profits which it made by virtue of its intermeddling with the properties of [that company]" (Br. 30). But there is no *res* on which to impress a trust, nothing was converted, there were neither losses, damages nor profits.

For the sake of clarity we therefore present our own statement of the case.

## STATEMENT OF THE CASE

### A. The proceedings.

This case starts in an intramural quarrel among Tobin, Wittmer, and Charles H. Owens, former associates of Owens Generator Company, Inc., hereafter called the "Generator Company". Tobin<sup>2</sup> and Wittmer, using the name of the Generator Company, as plaintiffs sued Charles H. Owens (hereafter called Owens) and Morris Lowenthal (formerly attorney for the Generator Company and for Owens in litigation against Heinz) as defendants. Doubtless because Heinz has leviabie assets and can respond to a judgment, plaintiffs dragged Heinz into the case as a defendant.

The complaint was filed July 18, 1957 (R. 1). Heinz promptly submitted to plaintiffs extensive requests for admissions of fact and documents (R. 14-72), followed by requests for admissions submitted by Lowenthal and Owens (R. 88, et seq.). The requests were not answered for 10 months (R. 79, 139, et seq.). Following denial by Judge Wollenberg of a motion to dismiss in December 1958,<sup>3</sup> Heinz promptly filed its answer to the complaint (R. 145), and in March 1959 Heinz called up the case for a pre-trial con-

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2. While Tobin later died and his executor was substituted, we shall hereafter include him in the terms "plaintiffs" and "appellants".

3. The basis of the motion was the statute of limitations, and it was denied strictly as a matter of pleading. *Owens Generator Co. v. H. J. Heinz Company*, 23 F.R.D. 121 (N.D. Cal. 1958).

ference (R. 161). Filing a "Pre-Trial Statement" (R. 163-180) in which it arrayed the facts as "admitted by plaintiffs" (R. 164), it stated (R. 174-175):

"Heinz has asked for this pre-trial conference to ascertain the basis upon which plaintiffs seek relief against *it*, to determine the issues of law, and to ascertain what, if any, possible issue of fact is involved in the claim against it. It desires, if possible, to avoid being involved in what may well be a long trial of a squabble between the former associates of the Generator Company involving charges and counter-charges of bad faith and double-dealing, all of which is apparent from the Lowenthal Request for Admissions and the responses thereto."

Appellants responded with a "Pre-Trial Agenda" (R. 181) in which they conceded that they were "*in general agreement with the evidentiary facts* of the case as stated by defendant Heinz." They repeated this concession at the pre-trial conference (R. 182 at 186, 187) and conceded that the issues might be reached by a motion by Heinz for summary judgment (R. 189, 194, 195). Finding some difficulty in pinpointing appellants' legal theory, the court then invited such a motion by Heinz (R. 193, 194).

Appellants had theretofore taken the depositions of Owens and Lowenthal (R. 330, et seq.; R. 376, et seq.), and before Heinz filed its motion these depositions were filed and appellants also took the deposition of plaintiff Tobin himself (R. 434, et seq.). Having awaited completion of discovery by appellants, Heinz then moved for summary judgment (R. 197). After full oral argument and written briefs, the motion was granted (R. 307-15), and judgment for Heinz was entered May 4, 1961 (R. 316). In granting the motion Judge Wollenberg made clear in his opinion (R. 307-315) that he was not passing on the rights of appellants as against the other defendants.

From the judgment plaintiffs appeal (R. 321). The defendants Owens and Lowenthal are not parties to this appeal.

**Opinion below.**

A copy of the opinion below is printed as Appendix I to this brief.

**B. The Facts.**

Since every matter of fact set out in Heinz's Pre-Trial Statement<sup>4</sup> was admitted to be true (see p. 3, *supra*), many of the basic facts stated below will be keyed to it as well as to the underlying record.

**1. The patents.**

August 10, 1937, Owens, as patentee, obtained Patent No. 2,089,412 for a vinegar generator (R. 164). We shall refer to this as the "first patent".

March 25, 1941, as patentee he obtained Patent No. 2,236,153 for a vinegar generator (R. 164). We refer to this as the "second patent".

The statutory life of a patent being 17 years (35 U.S.C. § 154), the first patent expired August 9, 1954, several years before this suit was filed, and the second patent expired March 24, 1958, eight months after the suit was filed and over 3 years before entry of judgment.

**2. Birth and demise of the Generator Company.**

March 10, 1938, the Generator Company was incorporated in New Jersey by Owens and appellants Wittmer and Tobin (the latter acting primarily for two aunts, Mrs. Revere and Miss McCurry see fn. 14, pp. 25, 26 *infra*). The Generator Company then entered into three written agreements with Owens (R. 355, 359, 363). Thereby Owens granted to the Generator Company an exclusive license under the first patent<sup>5</sup>

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4. And there documented to the record.

5. The second patent was then neither in existence nor applied for.

"for so long as [Generator Company] shall continue in business or to the end of the term for which the said letters patent, or any extensions thereof, were granted, *whichever event shall first occur*. If, however, the party of the first part shall terminate its said business at any time hereafter, whether by insolvency proceedings in any state court, Bankruptcy, or for any reason, either voluntary or involuntary, then, and in that event, the license hereby granted shall immediately terminate and become void and for nothing holden." (R. 359-60; also R. 20, 80, Admission to Request 31; R. 365)

Prior to November 25, 1941, the Generator Company became insolvent.<sup>6</sup> On January 19, 1943, it was deprived of its charter by a proclamation of the Governor of New Jersey issued under New Jersey Stat., Tit. 54, ch. 11, §§ 1 and 2. Except for the power to sue and to be sued in winding up, the Generator Company *no longer had power to do anything*. Under section 2 of the foregoing statute, "all powers conferred by law upon [the company] shall thereafter be inoperative and void." Thus the Generator Company no longer existed "for the purpose of continuing the business for which [it was] established." N.J. Stat., Tit. 14, ch. 13, § 4 (R. 166).

### 3. Litigation with Heinz.

Meanwhile, after its birth but before its demise, the Generator Company and Heinz entered into a written agreement in August 1940 whereby Heinz agreed to purchase one "Owens generator", and the Generator Company and Owens proceeded to install the generator in Heinz's plant in Berkeley, California.

On December 7, 1942, Owens sent a letter to the Generator Company, saying (R. 342, 343, 373, 374):

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6. On that day it and its officers and agents were enjoined, on petition of the Attorney General of New Jersey, "from the exercise of any franchise or the transaction of any business", and that injunction has never been dissolved and is still in effect (Br. 3; R. 18, 68, 79, 166, Adm. to Request 20(a) and (b); R. 166).



"\* \* \* for the past two years the Owens Generator Company has not been conducting or carrying on any business of any kind or character and the undersigned has been recently informed by the office of the Attorney General of the State of New Jersey that an injunction was issued by the Court of Chancery of New Jersey on November 25, 1941 enjoining the Owens Generator Company from doing business.

"In view of the fact that for some time past this Company has not been engaged in any business and cannot engage in any business at the present time, it is obvious that in accordance with the express provisions of Paragraph 1 of the said agreement of March 11, 1938 the license granted by the undersigned has been terminated and has become void and it is the purpose of this letter to confirm the aforesaid termination of said license.

\* \* \* \* \*

"The undersigned, however, will remain as President of the Owens Generator Company for such further reasonable time as the undersigned deems necessary to assist in the collection of the claim arising out of the sale and installation of the said generator [the one installed in Heinz's Berkeley plant] providing that the undersigned receives the necessary cooperation of the remaining officers and stockholders of the company."

Somewhat over a year before this letter and on November 25, 1941, Heinz obtained from Owens (not from the Generator Company) a written license to build generators under the first patent, in addition to the Berkeley generator. In 1943 Owens asserted that this license had been obtained from him by misrepresentation of its contents. He further claimed that, while the Generator Company no longer had an interest in the patent, it had had an exclusive license at the time he executed the 1941 license to Heinz and therefore that license, having been executed by him personally, was without effect. Heinz both denied the charge of misrepresentation and further asserted that during the time the Generator Company still had its exclusive right Heinz had obtained an oral

agreement from the Generator Company, as part of the arrangements by which it bought and paid for the Berkeley generator, that it could build more generators, and that the document of November 1941 merely fulfilled that commitment (Admission to XIV-9 and 11, R. 102 and 142).

Consequently, on November 16, 1943, the Generator Company and Owens, as plaintiffs, represented by Morris Lowenthal, Esq., as their attorney, brought suit against Heinz in the Superior Court of Alameda County "for declaratory and other relief" (R. 22-32).<sup>7</sup> We shall refer to this as the Alameda suit.

One purpose of the suit was to rescind and cancel the license which Owens had given to Heinz in 1941; one of the allegations of the complaint was the contention, noted above, that the license, having been given by Owens at a time when the Generator Company was still exclusive licensee and without its authorization, was ineffective (Para. VI, R. 24, 25), an allegation with which Heinz took issue in its answer in that case (Para. X, R. 227 at 233, 234). Heinz's answer also raised the contention, mentioned above, that it had obtained an oral agreement from the Generator Company in 1940 that it could build more generators (Para. X, R. 233-4, Para. V, R. 243). This was one of the issues passed on by the Alameda Court in its findings (R. 221). If Owens should succeed in cancelling the 1941 license, the Generator Company would have been subject to a claim for damages to Heinz for breach of this alleged agreement, unless it should concurrently obtain a declaration that no such agreement had been made. It was therefore a proper party plaintiff to the suit, which sought just such a declaration, and it was joined as a plaintiff for that reason (R. 351). In *H. J. Heinz Co. v. Superior Court*, 42 C.2d 164, 170-71, 266 P.2d 5 (1954), the Supreme Court of California

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7. While the Generator Company had theretofore ceased to exist for the purpose of continuing business, it still existed for the purpose of suing and being sued.



describes Heinz's answer in the Alameda action as asserting rights to build generators "not only upon the basis of the alleged 'license' of November 25, 1941, but also upon the basis of an alleged oral agreement claimed to have been made with plaintiffs [plural] prior to August 28, 1940 \* \* \*."

The complaint in the Alameda action plainly alleged that Owens alone now had any interest in the patent. It further alleged that it sought an injunction against Heinz in order to protect *Owens'* right to utilize the patent in any way *he* saw fit for *his* benefit. Thus it alleged that *Charles Owens* "*now is the owner and holder of*" the patent (Para. IV, R. 23). It also alleged—not that the Generator Company was then a licensee or then had a license under the Owens patent—but *only that previously, during the years 1940 and 1941, it had had such a license* (Para. V, R. 23). The allegation that Owens personally was the owner when suit was brought, coupled with the allegation that the Generator Company *had been* a licensee for a period of time *then passed*, was, of course, an allegation that the Generator Company no longer had a license under the patent. These allegations were strictly conformable to the fact that the 1938 license from Owens to the Generator Company was to extend only "for so long as [the Generator Company] shall continue in business" and the further facts that in November 1941 the Generator Company had been enjoined by the Attorney General of New Jersey from doing business and in January 1943 had had its charter revoked (p. 5, *supra*).

The complaint further alleged (Para. V, R. 29) that Heinz threatened to build and operate vinegar generators

"of the type and character covered by the Letters Patent *owned by plaintiff Charles H. Owens*, and said threats and said claim to license to build said vinegar generators have caused and will continue to cause, unless defendant is enjoined and restrained by order of this Court, irreparable damage to and depreciation in the value *of the letters patent*

*owned by plaintiff Charles H. Owens* and the said threats and claims of defendant tend *to cloud the right, title and use that the said plaintiff* has in the said patent and to impair the market value thereof and to prevent *the said plaintiff* from handling and utilizing the same in the manner most to **his** interest as owner thereof.”

The Generator Company, as well as Tobin and Wittmer, were advised of the institution of the Alameda suit against Heinz in the name and on behalf of Owens and the Generator Company as plaintiffs, and they approved the filing of that suit. The Generator Company admits that it was a party to the suit (R. 142, Para. XIV-F) and concedes that it is bound by the allegations of the complaint and by the facts as adjudicated in the judgment thereafter entered (Br. 34).

The Findings of Fact and Conclusions of Law in the Alameda action issued in December 1944 and found that Owens “was and *now* is the owner and holder” of the patent (Para. IV, R. 208), and that “During all of the year 1940 *and the year 1941* plaintiff Owens Generator Company, Inc., by a written agreement between plaintiff Charles H. Owens and plaintiff Owens Generator Company, Inc., was the holder of the exclusive license” under the patent (Para. V, R. 209).

Judgment was entered on December 21, 1944 (R. 33-34; admitted, R. 15, 79). It determined that the license of November 25, 1941 from Owens to Heinz was void, decreed that Heinz had

“no right or license to build or have built for itself or to maintain or to operate vinegar generators of the type, kind or character covered by the Letters Patent \* \* \* *owned by plaintiff Charles H. Owens*, more particularly described as \* \* \* No. 2,089,412 \* \* \* and \* \* \* No. 2,236,153 \* \* \* (R. 33)

and enjoined Heinz (R. 34)

"from asserting any rights or claims based or founded upon or arising out of said original document of November 25, 1941 \* \* \* and from asserting or claiming the right or license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent \* \* \* *owned by plaintiff Charles H. Owens*, other than the one vinegar generator installed by plaintiffs at the H. J. Heinz Company factory in Berkeley, California."

It was admitted, in response to a request, that the Superior Court, by its judgment and findings, found that *Charles Owens* owned the patents (R. 100, 141, Admission to XII-10; R. 169).

The Generator Company, Tobin and Wittmer were informed of this judgment by March 27, 1945, if not earlier, for on that day Owens wrote another letter to the Generator Company, Tobin and Wittmer, admittedly received. By it Owens referred to his letter of December 7, 1942, notified them of the judgment, and gave notice that he was

"resigning as of the date of this letter from the office of President of the Owens Generator Company, and from said date henceforth will make no claims and assume no duties or obligations as an officer of the Owens Generator Company." (R. 73, 74, 170).

At no time did any of the former officers, directors or stockholders of the Generator Company object to this letter, do anything about it, or make any inquiry about anything in it; and at no time thereafter did the Generator Company engage in any business, purport to carry on, or continue in business, or advise Heinz that the Generator Company or any appellant still had or claimed any license or interest in either patent (R. 19, 82, Admission to Request 27; R 101, 141, Admission to XIII-12; R. 170).

#### 4. The contempt proceedings.

More than 4 years later, on September 8, 1949, Owens, represented by Mr. Lowenthal as his attorney, instituted civil contempt proceedings against Heinz in the Alameda County Superior Court.<sup>8</sup> These contempt proceedings were instituted *solely by Charles Owens on his own behalf alone*; none of the appellants were parties to the contempt proceedings, and Owens proceeded therein solely in his individual capacity (R. 17, 79, Admission to Request 14; R. 171).

In these proceedings Owens charged Heinz with violating the injunction of 1944 by building a number of generators. On July 13, 1951, the Superior Court issued in "interlocutory order" (R. 35-61) and on March 24, 1952, a "final order, decree and award" (R. 62). The Superior Court thereby held that by building a number of vinegar generators in and after June 1946 Heinz had violated the injunction to Mr. Owens' damage. Heinz was ordered to pay to Owens—not to the Generator Company—compensatory damages of \$375,934.66 and to destroy the generators. The "interlocutory order" found that the generators fell under the coverage of the first patent but stated that it was unnecessary to find whether they came under the second patent (Para. VI, R. 43; Para. VII-G, R. 51).

On appellate review<sup>9</sup> Heinz contended that the Superior Court had no power to enter the contempt order, that a state court could not try an issue of patent infringement, since such an issue lay within the exclusive federal jurisdiction, and that it had been denied the right to litigate the scope of the patent and the validity of the patent, which the Superior Court refused to try. Owens

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8. Contempt proceedings in California, even though they bear the same title and number as the action out of which they arise, are an independent and separate case. *In re Du Bois*, 120 C.A. 2d 890, 262 P.2d 340 (1953); *Gale v. Tuolumne County Water Co.*, 169 Cal. 46, 51, 145 Pac. 532 (1914).

9. Contempt proceedings in California are reviewable only by review akin to certiorari and confined to questions of jurisdiction.

argued that it was unnecessary to establish that the patent was valid. Heinz argued that the 1944 injunction merely enjoined building generators under a claim of right pursuant to the license of 1941. Owens argued that the injunction enjoined infringement and that, if it went too far, it should have been appealed.

The District Court of Appeal annulled the contempt order, 252 P. 2d 402 (1953). The Supreme Court of California granted a hearing, and on January 29, 1954 unanimously annulled the contempt order insofar as it awarded damages but, by a 4 to 3 vote, affirmed it insofar as it ordered destruction of the generators. *H. J. Heinz Co. v. Superior Court*, 42 C. 2d 164, 266 P. 2d 5 (1954).

##### **5. Settlement of the controversies between Heinz and Owens.**

Heinz then obtained from Mr. Justice Douglas of the United States Supreme Court a stay pending filing of petition for certiorari (R. 309; Br. 7). But before filing the petition, negotiations for settlement between Heinz and Owens occurred, and the matter was settled.

The "interlocutory order" in the contempt proceedings had found and adjudged that Owens "was and *now is* the *sole* owner and holder" of the patents, that while the Generator Company *had had* an exclusive license for a time, that license was "fully terminated and cancelled during the year 1945" (Para. II, R. 38). The final order found that the generators out of which the contempt proceedings arose had been built afterwards, i.e., in or after June 1946 (Para. V, R. 65), i.e., long after the date on which it was adjudicated that the license to the Generator Company had terminated.

Consequently, just as the Generator Company was no party to the contempt proceedings, it was no party to the settlement.

In May 1954 Heinz paid Owens \$200,000 for a written assignment of his rights in the second patent, \$40,000 for a written



assignment of his rights in the first patent, and \$10,000 for a written release and satisfaction of all claims possessed by him against Heinz (R. 173, 419-428). On May 17, 1954, the Superior Court of Alameda County, on the motion of Heinz and Owens, vacated the final order and interlocutory order in the contempt proceedings, and discharged the order to show cause on which the contempt proceedings were based (R. 264). The Superior Court also dissolved, *nunc pro tunc* as of December 21, 1944 (the date of its issuance), the injunctive provisions of the judgment entered in the Alameda suit (R. 268), as it had the inherent power to do (see p. 47, *infra*).<sup>10</sup>

In June 1954, if not earlier, Tobin knew that Owens had settled *his* litigation with Heinz (R. 17, 21, 83, Admission to Requests 13a and 35g; R. 173, 174). Appellants never made any attempt in the Superior Court to set aside the order annulling the injunction in the Alameda suit (R. 109, 142, Admission to XVI-5a; R. 174).

**6. Review of facts relative to knowledge and state of mind of appellants, and relative to limitations, laches and other bars to suit based on delay.**

Although Tobin knew very shortly of Owens' settlement with Heinz and his receipt of \$250,000, he entertained no thought that Heinz was thereby liable to the Generator Company. On the contrary, he welcomed the transaction and assumed, so he testified, that Owens would give the Generator Company a share of the \$250,000 (see item (t) on p. 19, *infra*). Only when Owens told him to "go to hell" did he seriously think of suit. And not until the suit was filed was there any intimation to Heinz of any claim against it (R. 109, 142, Admission to XVI-33).

This suit was filed on June 18, 1957—14½ years after the Generator Company's charter was revoked, 12½ years after the

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10. In their brief at p. 4 appellants erroneously state that the "judgment" was vacated (Br. 4). Only the injunctive provisions were vacated; the declaratory provisions were not. Appellants' brief correctly states the fact at p. 7 and quotes the text of the order at p. 27.

judgment was entered in the Alameda suit, 11 years after Heinz built generators, 7½ years after the filing of the contempt proceedings by Owens, and over 3 years after those contempt proceedings had ended in a settlement between Owens and Heinz. It is a classic example of the case of persons who have known for years that any claim or pretensions they may have in or to property are denied and rejected and abandon any attention to it until they learn years later that another has realized some gain and then, after further long delay, cast about for someone with money to sue in the hope of a windfall.

Basic facts may be enumerated as follows:

(a) As far back as April or May 1938—19 years before this suit was brought—Tobin became antagonistic to Owens because Owens had applied for the second patent in his own name. Tobin testified that from April 1941 to some time in 1946 he never saw Owens or even tried to communicate with him (R. 506-7) and remained antagonistic to him at all times (R. 454-5, 501, 502), in good part because he felt that Owens had wronged the Generator Company by having the second patent issued in his own name, in March 1941. Tobin always thought that the second patent ought to belong to the Generator Company (R. 489, 510), and for years he had in mind that the Generator Company should bring some sort of suit against Owens to establish rights in the second patent; he talked to his son about this in 1941, 1942 and 1943 (R. 489, 490). Yet when Owens visited him at his home in 1946, Tobin said nothing on the subject (R. 463, 483-4), and he never did anything about it.

(b) Shortly after the Attorney General of New Jersey enjoined the Generator Company from doing business in 1941 Owens was denying any rights of the Generator Company in the first patent as well as the second. Appellant Wittmer knew this, for he wired Owens on July 10, 1942 stating that he had consulted lawyers to challenge Owens' asserted right to "withdraw patent from company" (R. 391).



(c) On December 7, 1942, Owens wrote the letter to the Generator Company denying any further rights of the Generator Company in the first patent (see pp. 5, 6, *supra*).

(d) On April 15, 1943, Mr. Lasher, an attorney representing Tobin's own principals in the Generator Company (see footnote 14 on p. 25, *infra*), wrote Owens asking him to withdraw his letter of December 7, 1942 "whereby he sought to terminate the license of the corporation" (R. 394, 395). Lowenthal, for Owens, replied on May 14, 1943, refusing to do so (R. 396). The reply said:

"Mr. Owens has asked me to state to you emphatically that he will not withdraw his notice \* \* \*. *He has no intention whatever of granting a new license or of carrying on any further activities on behalf of the Owens Generator Company \* \* \*.*" (R. 397)

(e) The Alameda suit was filed on November 16, 1943. Alleging that Owens owned the patents and that the Generator Company had merely been a licensee in 1940 and 1941, this again *was repudiation by Owens* and known to the co-plaintiff, the Generator Company, in 1943 (R. 464-5).

(f) The next day Mr. Lowenthal advised Mr. Lasher in writing of the filing of the suit (R. 568). Mr. Lowenthal asked Lasher to "relay this information to those connected with the company in the East." Lasher did forward the letter to Tobin (R. 488).

(g) The Alameda judgment, December 31, 1944, adjudicated that Owens owned the patents.

(h) Appellants knew of this judgment. On March 27, 1945, Owens wrote a letter, with separate copies sent to the Generator Company, to Bentley, its secretary, to Tobin, to Wittmer, and to McCurry (a large investor, see fn. 14, p. 25, *infra*). This was received by each (R. 19, 73, 79, Admission to Request 26; R. 101, 141, Admission of XIII-7 to 11). The letter reads (R. 73):

"On December 7, 1942, you were informed by the undersigned that he would remain as President of the Owens Generator Company 'for such further reasonable time as the undersigned deems necessary to assist in the collection of the claim arising out of the sale and installation of the (H. J. Heinz Company) generator, providing that the undersigned receives the necessary cooperation of the remaining officers and stockholders of the company'.

"Despite the fact that the cooperation referred to was not given to the undersigned, the undersigned proceeded to comply with the foregoing statement and collected the claim against H. J. Heinz Company for the generator installed by the Owens Generator Company at the H. J. Heinz Company's Berkeley plant.

"In addition, the undersigned at his own expense prosecuted a legal action against the H. J. Heinz Company and obtained a permanent injunction against the H. J. Heinz Company claiming the right to manufacture or have made for itself any generators of the type covered by the patent owned by the undersigned.

"The undersigned believes that he has gone beyond his obligations and duties as an officer of the Owens Generator Company, despite the failure of the company and of its other directors and stockholders to give him any assistance either financially or otherwise.

"In any event, in accordance with the letter of December 7, 1942, the undersigned is hereby notifying you that he is resigning as of the date of this letter from the office of President of the Owens Generator Company, and from said date henceforth will make no claims and assume no duties or obligations as an officer of the Owens Generator Company."

This letter referred to that of December 7, 1942, reaffirmed it, advised of the judgment against Heinz, and asserted that the patents belonged to Owens. The last paragraph makes quite clear that "from said date [March 27, 1945] henceforth [the undersigned] *will make no claims and assume no duties or obligations*

as an officer of the Owens Generator Company". This repudiated any further fiduciary obligation to the Generator Company, if any theretofore existed.

(i) This letter of March 1945 was intended by Owens to mean, and was understood by Tobin to mean, that Owens had "quit", lock, stock and barrel. Thus Tobin testified that he did not care where Owens was, because "He quit in 1945" (R. 506). This is further evidenced by a letter of January 4, 1949 to Owens (R. 135) from one Permut as Wittmer's attorney, written at Wittmer's request and on the basis of information given by Wittmer (R. 91, 139, Admission to III-39, 40, 41). It states:

"As you will recollect, Mr. Wittmer, you and some others *were* associated in connection with the vinegar generator *up to* about the year 1942."

This clearly recognizes that Owens ended the association about 1942.

(j) At no time after the letter of March 1945 until this suit did anyone connected with the Generator Company claim that Owens was thereafter "an officer of the corporation", "a director of the corporation", a "stockholder of the corporation", or "owed any fiduciary duty as officer, director, or stockholder, to the corporation" (R. 101, 141, Admission to XIII-14).

(k) Tobin knew, for years before the instant suit was filed, that Owens had denied any rights of the Generator Company in the first patent. Thus on March 10, 1955, he wrote to an attorney, Mr. Leary (R. 275):

"Through some procedure *Mr. Owens withdrew his patent from the Owens Generator Co.* and sued Heinz in California *in his own behalf* and recently settled with Heinz for a very substantial amount (\$250,000).

"The writer *always felt that Mr. Owens had no right to withdraw his patent* from the company and feels he has an action against both Heinz and Owens \* \* \*."

This letter states what Tobin had understood and believed for years. But despite this feeling, neither Tobin nor the Generator Company did anything about it.

(l) Although the Generator Company, as party to the Alameda action, knew in 1943 that that suit had been brought (R. 465-6) and was chargeable with knowledge of its adjudication that Owens owned both patents, it never communicated with Heinz orally or in writing (R. 493), and when Tobin received the letter of March 1945, which referred to Owens' letter of December 7, 1942, he made no effort to find out what it was about (R. 506).

(m) The Generator Company knew in 1953 that Owens was again carrying on litigation with Heinz, *on his own behalf*, for Tobin was so told by one of the family in Idaho (R. 482). (The decision of the District Court of Appeal in *H. J. Heinz Co. v. Superior Court*, 252 P.2d 402 was handed down on January 14, 1953). This was a year before Heinz settled with Owens.

(n) In January and February 1954—still several months before Heinz and Owens settled—Mrs. Tobin, having visited Owens in California (R. 467), reported to Tobin that the Owensses were “winning legal actions against Heinz” (R. 478; also R. 83). The Supreme Court of California decided *H. J. Heinz v. Superior Court*, 42 C.2d 164, 266 P.2d 5, on January 29, 1954.

(o) The settlement was not concealed. It was in part effected through court proceedings in Alameda County on May 17, 1954 and by writings recorded in the Patent Office on June 24, 1954 (R. 203, 206).

(p) About June 21, 1954, just 3 days short of 3 years before this suit was brought, Mrs. Owens sent to Tobin a photograph of Owens, herself and Mr. Lowenthal holding the settlement check and Tobin saw it (R. 468-471, 573).

(q) That very day Tobin's cousin, Jack Revere, visited him and told him that Owens had received money in settlement from Heinz (R. 468, 476-7), but Tobin was not sufficiently interested

or diligent to ask how much (R. 513). *Tobin then suggested to Revere that the Generator Company should bring suit* (R. 480-1) and “knew” that he was going to take some action against Owens and Heinz (R. 514). *But still the Generator Company did nothing.*

(r) In August or September 1954 Tobin asked the Generator Company’s attorney, Mr. Bentley (R. 436), to sue Heinz and Owens, to take the present case and told Bentley that Owens had received \$250,000 in settlement (R. 475-478).

(s) In January or February 1955 Mrs. Tobin again visited the Owensens. Before she came home, and while telephoning Tobin, Owens came on the line to say hello; Tobin said nothing to him about any claims, although he had already asked a lawyer to sue Owens, but asked Mrs. Tobin to tell Owens to get in touch with him. On her return home she reported to Tobin that when she told this to Owens the latter had said that the Generator Company could “go to hell” (R. 497, 512-513). By this Tobin understood Owens to mean that he was not going to share any of the settlement proceeds with the Generator Company (R. 514).

(t) Tobin testified that one reason why he did not bring suit in 1954, when he learned of the settlement, is that he thought that Owens would give some of the proceeds to the Generator Company; that he “assumed from June of 1954 to [the time Owens told him to “go to hell”] that [he was] going to share in that check”, i.e., the \$250,000 settlement check (R. 513-14).

(u) In 1954 or 1955 Tobin spoke to Revere’s mother, who had put up most of the money in the Generator Company (see fn. 14, p. 25, *infra*), and suggested that the Generator Company should sue. In fact, he said that he was going to sue (R. 481).

(v) Appellants have admitted that Owens did not dominate the Generator Company after January 19, 1943, if he did before:

“plaintiffs do not contend that after January 19, 1943, the corporation or its former stockholders, directors, officers, or statutory trustees were unable to commence legal action



against Charles H. Owens on any claims that said corporation or said officers, directors, stockholders or trustees may have had against Charles H. Owens." (R. 104, 142, Admissions to XV-32; also to XV-34).

(w) Throughout the years the Generator Company tried to keep itself ignorant of what was going on. Referring to a visit of Owens to Tobin's home in 1946, where his wife and the Owenses were engaged in conversation, Tobin said, "I would put myself in the position that I wouldn't listen" (p. 491).

**C. Jurisdiction rests solely on diversity of citizenship; this is not a suit for patent infringement.**

While patents lie at its base, this is not a patent case, for appellants admitted that the complaint sought no relief against Heinz for patent infringement and did not contend that any patent involved was ever valid (R. 17, 80, Admissions to 18a, 18b, 18c). This was confirmed by the fact that the court's jurisdiction was invoked solely upon the basis of diversity of citizenship (Br. 2; Compl. Paras. 1 and 2, R. 1; R. 17, 19, Admission to 18(f)).

**D. Questions Involved and Summary of the Argument.**

Appellants state but one question as being involved (Br. 4): Whether Heinz was without notice of appellants' "rights" when it paid Owens and Lowenthal the sum of \$250,000 in the settlement of May 1954.<sup>11</sup> Appellants do not indicate in their statement of the question the nature of the "rights" to which they refer or the nature of the "property" to which the "rights" relate.

1. The first question is whether appellants had any rights at all. The District Court held that they did not. The 1938 instrument creating the Generator Company's interest in the first

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11. A second question is stated (Br. 5) as whether there is any genuine issue of fact, but appellants immediately concede "that there is no genuine issue as to any material fact".

patent was either a license or an assignment. If a license, it terminated when the licensee lost its corporate existence in 1943, for a license is personal. If an assignment, it automatically terminated when the Generator Company ceased business, in accord with its express specification of its duration. Moreover, the 1944 judgment in the Alameda action, to which both Heinz and the Generator Company were parties, is *res judicata* that the Generator Company no longer had an interest. As for the second patent, if the Generator Company ever had an interest, it came to an end at the same time and for the same reason as the first patent.

2. Only if it be assumed that appellants had an equitable interest in the patents is the second question reached, whether Heinz had notice. The District Court held that it did not. A major fact is that in the Alameda complaint of 1943, the Generator Company represented, and the court then adjudged, that the Generator Company's interest was merely that of a one time license since expired. The orders in the contempt proceedings reasserted this fact to Heinz, and the Generator Company, while aware of both litigations, never asserted to Heinz any contrary claim.

There are still other questions. Even assuming that appellants otherwise had rights,

Did Heinz invade them? and

Were they not barred by time under doctrines of limitations and laches?

The District Court stated that it did not find it necessary to reach these issues, although raised by Heinz (R. 315). But since it is elementary that a "successful party in the District Court may sustain its judgment on any ground that finds support in the record", *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Tinnerman Products, Inc. v. George K. Garrett Company*, 292 F.2d 137, 138 (3 Cir. 1961), we shall conclude our brief with a discussion of these additional grounds for affirmance.



3. As respects the first of these two additional questions, appellants' sole theory is that of a constructive trust. But there is no *res* on which a trust can operate. The patents are expired. No profit came to Heinz from the assignment of the patents to it, for it did not exercise the patents or receive anything from others as royalties. Appellants suffered no loss, for they never sought to exercise the patents or were denied the right to do so. Nor can appellants recover for the annulment of the injunction provisions of the 1944 judgment, because (a) having been annulled, the injunction legally never existed, (b) the injunction issued for the protection of interests of Owens only and not of the Generator Company, and (c) the Generator Company lost nothing by virtue of the annulment. Finally, by failing to disaffirm the assignments by Owens to Heinz for nearly 3 years, the Generator Company in law affirmed and ratified them.

4. The case is barred by limitations because Owens repudiated and denied, to the Generator Company's knowledge, any interest or claim on its part to either patent, many years before 1954. Additionally, suit was commenced over 3 years after the 1954 settlement, and appellants failed to show lack of discovery. Even on appellants' theory that suit was commenced 2 years, 11 months and 25 days after "discovery", this delay constituted laches barring a suit to impress a constructive trust.

## ARGUMENT

### I.

#### APPELLANTS WERE WITHOUT RIGHTS IN THE PATENTS.

**A. First Patent: Any interest appellants had therein expired by its terms years ago, and this is *res judicata*.**

**1. The license ceased when the Generator Company ceased business.**

The only interest the Generator Company ever had in the patents was a license in the first one. That license, by its express terms, was only "for so long as [the Generator Company]

shall continue in business" (see p. 5, *supra*). The Generator Company was plainly out of business after January 19, 1943, when the Governor of New Jersey, acting under New Jersey law, deprived the Generator Company of its charter, and it thus entirely ceased to exist "for the purpose of continuing the business for which [it was] established." (see p. 5, *supra*) Moreover, appellants admitted that at no time after receipt of the letter of March 27, 1945 did the Generator Company "engage in any business or purport to carry on or continue in business" (R. 101, 141, Admissions to XIII-12). Thus the patent license terminated automatically no later, in any event, than March 1945, and Heinz built no vinegar generators and bought no patent rights or claims from Owens until long afterwards. Using the phrase "condition subsequent" to refer to the specification that the term of the grant was "for so long as the said [Generator Company] shall continue in business", appellants concede that "It is indisputable that the condition subsequent came to pass," (Br. 41).

The consequences of these facts are self-evident:

1. Treating the patent agreement as a license, as it describes itself, it automatically terminated when the Generator Company ceased to have any legal right to exist, *even had it not contained the quoted termination language*, because a patent license ceases when the licensee ceases to exist. In *Haffcke v. Clark* 50 Fed. 531, 536 (4th Cir. 1892), it is said:

"It is settled law that a license to use a patent is a personal privilege, which terminates with the life of the individual licensee to which it is granted, unless the grant contains words expressly conferring the power to sell or assign. In the absence of such power, if the licensee be a natural person and dies, or an artificial person or partnership and ceases to exist, the license expires equally in either case."

In *Keystone Type Foundry Co. v. Fastpress Co.*, 272 Fed. 242, 246 (2nd Cir. 1921), it is said:

"But plaintiff has gone out of business; it has ceased its corporate activities, except for the purposes of liquidation and is in the process of arriving at a legal death. Under such circumstances its license expired with the cessation of its corporate activity. *Haffcke v. Clark*, 50 Fed. 531, C.C.A. 570, citing cases."<sup>12</sup>

2. Appellants argued in the court below that the license should be construed, not as a license, but as an assignment, subject to defeasance on the happening of a "condition subsequent" which would give the patentee a right of "re-entry" but require the exercise of the right of "re-entry" by some affirmative assertion. The District Court succinctly answered this by observing (R. 312) that if the agreement were to be construed as an assignment, then the "words of the assignment control: 'For so long as such [Generator Co.] shall continue in business.'" *Those words measure the duration of the grant*, and under the plain meaning of the language the duration came to an end automatically. The interpretation of a patent assignment is the same as the construction of the meaning of any contract. *Nicolson Pavement Co. v. Jenkins*, 81 U.S. 452, 456 (1871). The event occurring, the grant ceased by "operation of law", *Pierpoint Boiler Co. v. Penn Iron & Coal Co.*, 75 Fed. 289, 293 (1896), and no act of Owens was necessary to effect a cessation. A case which appellants frequently cite, *Daily v. Universal Oil Products Co.*, 76 F.Supp. 349 (1947), recognizes that a license to continue "so long as the company, its successors or assigns should in good faith carry on the process

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12. The District Court also cited, to the same effect, *Kenyon v. Automatic Instruments Co.*, 63 F. Supp. 591 (W.D. Mich. 1945). Appellants assert that *Kenyon* was reversed on appeal in 160 F.2d 878 (1947). But the Court of Appeals did not disapprove the principle that a license ceases when the licensee ceases; it differed from the District Court simply by construing the particular agreement as an assignment of the patent and not a license.

\*\*\* under said letters patent \*\*\*" (p. 353) would end when the licensee ceased to carry on the process.<sup>13</sup>

3. In the third place, if it was necessary for Owens to act affirmatively to terminate, he did so by his letter of December 7, 1942, quoted at p. 6, *supra*.<sup>14</sup> And Tobin fully understood

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13. As there said, 76 F.Supp. 349 at 357,

"Whether title to the patents remained in Sunset until the patents were transferred in 1914, depended on whether the Sunset Oil Refining Company, its successors or assigns, continued in good faith to carry on at that time the process of treating and refining petroleum oils."

While the court in the *Daily* case found that the licensee had never ceased to carry on the process, i.e., that the event marking termination had not occurred, appellants concede that the event did occur in the present case (p. 23, *supra*). In the *Daily* case the license was to Sunset, "*its successors or assigns*", words underscored by the court (*Id.* at 353). Here the license was wholly personal to the Generator Company.

14. Appellants have abandoned a contention tentatively made below that the letter was not received. The contention was based solely on a statement of Tobin on deposition merely that *he* did not "recall" receiving the letter (R. 464). Of course, this was not evidence that he did not receive it. Moreover, the letter was sent in several copies, not only one to the attention of Tobin, but one to Wittmer and one to Bentley, neither of whom denied receipt. The statement in appellants' brief (p. 17) that there is a dispute as to whether Wittmer received it has no basis in the record. Bentley was the Generator Company's general counsel (R. 95, 140; Admission VII-91), its agent for service of process named in its charter (R. 517), the person whose office was the Company's main office (R. 96, 140, Admission VII-101), and an officer of the Company, and handled its correspondence (R. 91, 96, 104, 139-140, 142; Admission III-7a, VII-96, 100, 113, XIV-49, 50). Moreover, the letter is referred to and quoted in part in the letter of March 27, 1945 from Owens to appellants, which Tobin admits he received without objection or inquiry about anything in it (R. 19, 73, 79, 82; Admissions of Requests 26 and 27). In his deposition Tobin again admitted that he received the letter of March 27, 1945 but made no inquiry respecting the earlier letter (R. 466, 467). Furthermore, a Mr. Milton Lasher informed Owens on December 31, 1942 that the letter of December 7, 1942 had been brought to his attention (R. 136). Mr. Lasher was the attorney for Miss McCurry and Mrs. Revere, and they were two of the investors in the Generator Company and aunts of Tobin; in fact they had put up four-fifths of all the cash for which stock was to be issued in Tobin's name and which was the only cash ever received by the company for stock (R. 92, 97, 140; Admissions to VI-5, 6 and VIII-3). Revere had guaranteed obligations of the Company (Br. 13). Tobin testified that from the begin-

that Owens had done so; we quoted at p. 17, *supra* a letter of Tobin's in which he said he had long known that "Mr. Owens withdrew his patent from the Owens Generator Co. and [then] sued Heinz in California in his own behalf."

**2. It is, moreover, *res judicata* that the Generator Company's interest ceased years ago.**

Because of their plain untenability, appellants abandon the arguments they made on the subject below and, embracing an argument we made in the District Court, try to turn it upside down. We said below<sup>15</sup> that if the license were a grant of an exclusive right for the entire life of the patent, subject only to termination on a "condition subsequent", it would have been in legal effect an assignment of the ownership of the patent, regardless of what it was called, but in that event it was *res judicata* that the assignment had come to an end, because the Generator Company, Heinz and Owens, *all three*, were parties to the Alameda action and whatever was adjudicated in that action, and whatever matter might have been urged to sustain or defeat the determination, is conclusively binding on each and all of them here. *Brewer v. King*, 139 C.A. 2d 33, 42, 293 P.2d 126 (1956); *Krier v. Krier*, 28 C.2d 841, 843, 172 P.2d 681 (1946); *United States v. Munsingwear*, 340 U.S. 36, 38 (1950); *Mitchell v. Jones*, 172 C.A. 2d 580, 585-6, 342 P.2d 503 (1959); *Price v. Sixth*

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ning he represented their interests in the Generator Company (R. 442, 479). By a letter of April 15, 1943 to Lowenthal (R. 394-5) Lasher asked Owens to withdraw the letter of December 7, 1942. Obviously Lasher got the letter of December 7, 1942 from his clients, McCurry and Revere, the principals of Tobin, and they got it from Tobin. It is obvious why appellants do not now contest that the Generator Company received the letter (Br. 17).

15. Citing *inter alia*, *All Steel Engines, Inc. v. Taylor Engines*, 88 F. Supp. 745, 747 (N.D. Cal. 1950); 69 C.J.S. Patents § 223, p. 738; *Dyrenforth v. Palmer Pneumatic Tire Co.*, 240 Ill. 25, 88 N.E. 290, 295 (1909); *Allen v. Werner*, 190 F.2d 840, 842 (5 Cir. 1950).



*District Agricultural Assn.*, 201 Cal. 502, 511, 258 Pac. 387 (1927).

The complaint in the Alameda action alleged that Charles Owens "now is the owner and holder of the patent" (p. 8, *supra*). The Supreme Court of California has described the complaint as "charging that *he* [Owens] was the owner of a patent for a vinegar generator", *H. J. Heinz v. Superior Court*, 42 C.2d 164, 166, 266 P.2d 5 (1954). That complaint alleged that the Generator Company *had been* a licensee *at a prior time*, then past, in 1940 and 1941, and the findings, conclusions and judgment of December, 1944 adjudicated that the patent was then owned by Charles Owens. It was thus adjudicated either that no exercise of a "right of re-entry" had been necessary to terminate the Generator Company's interest, or, if necessary, it was done. That is, the findings and judgment in the Alameda action that Owens was *then* the owner of the patent *was an adjudication that whatever fact was necessary to make him the owner, whether a sufficient exercise of a right of re-entry, occurrence of a condition subsequent, or whatever other fact was necessary, had occurred*. Behind that determination the parties may not go.

Appellants now urge that the license was an assignment (Br. 30) and adopt our argument, which they resisted below, that the findings and judgment in the Alameda action are *res judicata* and conclusive (Br. 34, et seq.). But they then argue, with audacity, that the "District Court misconstrued the Alameda judgment" and that, instead of adjudicating that Owens was the owner, it adjudicated that the Generator Company was an owner! (See Br. 35, et seq.)

There is no substance to this effort to call black white. The gist of the effort is that while the Alameda court adjudicated that Owens was the "owner", it did not say "sole owner". But the common sense meaning of a judgment that A is the owner, in a

suit where B is also a party, is that B is not.<sup>16</sup> Indeed, appellants' present position runs counter to the admission in response to a request for admission (No. XII-10, R. 100, 141):

"That the Court in its judgment and findings in the action against the H. J. Heinz Company, Alameda County Superior Court No. 175935, in December, 1944, found that *Charles H. Owens owned the patents.*"

The judgment went further; it *expressly adjudicated what interest the Generator Company had* by finding that the Company *had been* a licensee in 1940 and 1941—a time then past, i.e., that it was not a licensee now. This adjudication necessarily conclusively determined that the agreement of 1938 on which the Generator Company founds its claim was a license agreement, and adversely disposes of the argument about "conditions subsequent" and construction of it as an assignment of title.

Moreover, the interpretation of a decree is for the court that issues the decree; it knows best what it meant. Here the Alameda court, in the subsequent contempt proceedings, interpreted its prior judgment as saying that Owens was the "sole owner" (R. 38, and see Br. 22).<sup>17</sup>

**The fact that the Generator Company was a proper party plaintiff in the Alameda action neither gave to it nor recognized in it any right in the patent.**

Appellants also seek to draw comfort from the fact that the Generator Company was recognized as a proper party plaintiff in the Alameda action and that one of the conclusions of law there was that "Plaintiffs Charles H. Owens and Owens Generator

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16. The only case appellants cite on this argument, *Pacific Coast, etc. Bank v. Roberts*, 16 C.2d 800, 108 P.2d 439 (1940) is not remotely in point. It merely holds that within the meaning of a particular statute, a mortgagee is not an "owner".

17. Since the Generator Company was not a party to the contempt proceedings, nothing therein is *res judicata* as between it and Heinz. But the orders in the contempt proceedings show how the very same judge in the Alameda court interpreted his own prior judgment.



Company are entitled" to the decree the court was rendering (R. 225; Conclusion VII). Appellants repeatedly fall back on this (e.g., Br. 21, 37, 41) and argue that if the Generator Company's rights in the patent had ended, it would have been necessary to dismiss it from the suit (Br. 40).

But we have seen why the Generator Company was a proper plaintiff although without interest in the patents (see pp. 6-8, *supra*). One of Heinz's contentions was that during the period when the Generator Company did have the exclusive license, it orally agreed with Heinz to give the latter a license to build other generators, and that the license given by Owens to Heinz in 1941 was in fulfillment of this commitment. If such a contract existed, and if the Owens' license to Heinz was not performance of that contract, the Generator Company could be liable in damages to Heinz for its breach. The Alameda complaint therefore not only sought to cancel the 1941 license given by Owens to Heinz but also, as shown by its title, to obtain a declaration that the Generator Company had made no such contract.

The injunction not only enjoined infringement of the patents but first it enjoined asserting rights or claims under the license (R. 34). In that phase of the injunction the Generator Company had an interest, since Heinz claimed the license on the basis of a contract with the Generator Company. But on its very face the Alameda complaint belies appellants' present contention that the complaint sought an injunction in order to protect any right of the Generator Company in the patents. At pages 8, 9, *supra* we quoted an allegation from that complaint which plainly stated that an injunction was sought to prevent a cloud on the "right, title and use that *said plaintiff* [Owens] had in the patent" and to safeguard "the *said plaintiff*" [Owens] in utilizing the patent "in the manner most to his interest as owner thereof."

Appellants' argument is unmindful of the modern liberal procedure for joinder of claims and parties, which was designed to

permit determination in one action of related matters, not to confer property rights on every party in every part of the judgment. *Gartler v. First Nat. Bk. of San Pedro*, 88 Cal. App. 411, 263 Pac. 566 (1928), cited by appellants (Br. 38), plainly states that parties may be joined as plaintiffs if there is a community of interest in their theories, although the relief each seeks or is granted is not exactly the same; yet *Gartler* was decided when Cal. Code of Civil Procedure § 378 was much narrower than it is now. When *Gartler* was decided, Section 378 read, as quoted in the opinion at p. 413:

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this title."

After that and before the Alameda case was filed, Section 378 was broadened to read:

"All persons may be joined in one action as plaintiffs who have an interest in the subject of the action *or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action*; provided \* \* \* judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for the relief to which he or they may be entitled."<sup>18</sup>

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18. None of the other cases cited by appellant on the subject (Br. 37, 38) is relevant. *Brum v. Ivins*, 154 Cal. 17, 96 Pac. 876 (1908) merely held that one who lets a judgment go against him by default is bound by it and cannot sue in equity to set it aside merely because he would have had a meritorious defense. In *Collins v. Butler*, 14 Cal. 223 (1859), two persons, as partners, had sued Collins, setting up their ownership as partners and recovering judgment for conversion. Collins later sued in equity to enjoin the judgment on the ground that the property he had converted really belonged to only one of the plaintiffs in the first suit and that he was entitled to a set-off of a claim he had against that one person. It was merely held that in the first suit he could have denied that the property was owned by the partnership and tried the issue then; not having done so, could not relitigate it in a second suit.

### 3. The case involves neither "waivers" nor "forfeitures".

Appellants' brief is replete with the word "forfeiture" and references to the specification in the agreement of its duration as a "forfeiture clause" (e.g., Br. 40, 42). But the grant of an interest for a limited time involves no "forfeiture" when the time expires, any more than anything is "forfeited" on the death of an owner of a life estate.<sup>19</sup> The grantee gets what he buys and no more.

No more meritorious is appellants' claim that Owens "waived" the termination of the license (e.g., Br. 17, 42). This is but a rephrasing of the fallacious claim that joinder of the Generator Company as a plaintiff in the Alameda action was inconsistent with termination of its interest. And there are several other flaws in the argument. First, the termination had already occurred before the Alameda suit was commenced. The Generator Company had been enjoined by the Attorney General of New Jersey from transacting any business at the end of 1941 (see p. 5, *supra*), so that it could not thereafter "continue in business", and in December 1942 Owens had already notified the Generator Company that the license therefore was at an end. Again, in January 1943 the Generator Company's charter was revoked. The Alameda suit was not commenced until November 1943.

Next, waiver is the "intentional relinquishment of a known right". Ordinarily, it requires either a new agreement with consideration or conduct creating an estoppel, that is, reliance to its prejudice by the party claiming waiver. Neither is present here. In the rare situations where waiver may be raised in the absence of the foregoing, the conduct must rise to an "abandonment".

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19. Appellants (Br. 43) cite *Haserot v. Keller*, 67 Cal. App. 659, 228 Pac. 383 (1924) as speaking of a forfeiture clause. The facts there were quite different. A patentee assigned, without limitation as to duration, an absolute  $\frac{1}{2}$  interest in the patent but obtained an agreement to reassign on demand if the assignee failed to sell a minimum of 25 units of the patented article per month.

*Chase v. National Indemnity Co.*, 129 C.A. 2d 853, 858, 278 P.2d 68 (1954).<sup>20</sup> It is baseless to argue that, by joining the Generator Company as a plaintiff in *the very complaint which alleged that Owens alone owned the patents*, that the Generator Company's license was one that had existed in 1940 and 1941, and that the injunction was sought to safeguard Owens in utilizing the patent "most to *his* interest as owner thereof", Owens waived the claim that he did own the patents and relinquished to the Generator Company power to interfere with his utilizing the patents as he saw fit to his own interest. Not only did Owens not understand that he was waiving anything, but Tobin did not suppose that Owens was, for Tobin later wrote that Owens "withdrew his patent from the Generator Co." (See p. 17, *supra*).

Finally, the Alameda judgment by having adjudicated that the Generator Company's license had terminated precludes any contention of waiver. The judgment implicitly adjudicated that nothing had occurred and that no fact or circumstance existed—whether waiver or anything else—which militated against the conclusion that Owens was then the owner and that the license had

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20. In the *Chase* case the court said (p. 858):

"To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to."

Bowers, *The Law of Waiver*, pp. 20-21:

"The doctrine of waiver has in every case one of three principles for its foundation—the concurrence of the wills of the parties; a contractual relation created by law; or estoppel induced by conduct."

In *Haserot v. Keller*, 67 Cal. App. 659, 228 Pac. 383 (1924) (App. Br. 43, discussed in footnote 19, *supra*) there was a waiver by reason of fraud and estoppel. When the assignee asked his assignor for samples to use to sell the articles in performing his commitment to sell 25 units per month, the assignor replied that he wanted none sold.

expired. *Krier v. Krier*, 28 C.2d 841, 843, 172 P.2d 681 (1946). This same fact also precludes appellants' argument that some fiduciary relationship between Owens and the Generator Company estopped Owens from standing on the termination provisions of the license (Br. 43).

**B. Second Patent: Either the Generator Company never had any rights or they terminated long ago.**

The second patent differs from the first in that Owens never recognized any right of the Generator Company in the second patent for any period, however brief. It was not issued by the Patent Office until nearly 3 years after Owens' license to the Generator Company, and there was no other license or assignment.

1. The basis of any claim to the second patent is nowhere clearly stated. No assignment or license by Owens to the Generator Company even mentioned the second patent. No document apprised Heinz of any interest of the Generator Company in the second patent. Heinz's 1940 agreement with the Generator Company to buy a generator antedated the second patent and referred only to a generator "identical and similar to, in every respect, the Owens installation at the plant of the Frank Tea & Spice Company, Cincinnati, Ohio" (R. 31; also Br. 13). The Frank generator was being built by Owens, under the first patent, before the Generator Company was formed (See Complaint, paras. 7 and 11, R. 2, 4; also Br. 11). The first mention to Heinz of the second patent was in the very judgment in the Alameda action which adjudged that both patents belonged to Charles Owens alone (R. 33).

Unless the claim is to be found in the allegations that Owens "agreed" with the Generator Company to grant it a license with respect to "improvements", the complaint alleges no license or grant of the second patent. We leave it to Owens and the Generator Company to litigate whether this covered an interest in the later patent. It does not affect Heinz, because the license to the



Generator Company was never recorded in the Patent Office (R. 21, 79; Admission to 34) and the patent laws protect a subsequent purchaser against a prior transfer of an interest which is not so recorded (35 U.S.C. § 261).

2. Moreover, if an interest in the second patent was created by the license that created the interest in the first patent, it came to an end when the interest in the first patent came to an end and for the same reasons.

Appellants' brief possibly argues that the Generator Company had an equitable right to the second patent because Owens was in a fiduciary relationship when he obtained it and used corporate funds (e.g., Br. 11). But *if* there was a fiduciary relationship, it arose by virtue of the very documents by which Owens entered the employ of the Generator Company and agreed with it on what their rights would be in the first patent and in "improvements", viz., that the Generator Company would have an interest *only so long as it continued in business*. The documents cannot be invoked to create the relationship and rejected as measuring the duration of the parties' rights.

3. The 1944 judgment is also *res judicata* that the Generator Company had no interest in the second patent, as well as in the first. The judgment refers to *both* patents; and appellants' response to requests for admissions admitted that it so adjudicated the ownership of *both* patents (R. 100, 141; Admission to XII-10).

**C. No equity of appellants, if there were any, reached through to Heinz, which had no notice.**

Plainly, if the Generator Company ever had a legal interest in the patents, it ceased to do so long before Heinz settled its dispute with Owens. Whatever *legal* interest the Generator Company had came to an end when it ceased to be in business, leaving full



legal title in Owens. Appellants therefore seek to fall back on some equitable interest.<sup>21</sup>

They do *not* claim that Heinz was ever a fiduciary to them but would charge Heinz with their alleged equities against Owens, on the theory that Heinz took from him "with notice" (Br. 46-60), conceding that "Heinz is protected if it was 'without notice'" (Br. 46). Preliminarily, it may be observed, the burden was on appellants to show notice, not on Heinz to show lack. Under California law, which governs, he who claims that by virtue of an equitable interest he has a right superior to the legal title has the burden of proving notice or lack of notice, as the case may be. *Ferguson v. Ferguson*, 58 C.A. 2d 811, 814-15, 137 P.2d 735 (1943).<sup>22</sup>

The towering fact in this case is that twice in ten years Heinz had been pursued and harassed in litigation, and each time it was told both by the adverse parties *and* the court that Owens owned

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21. While Heinz has not involved itself in the question whether, as between Owens and the Generator Company, there were equities, the briefest inspection suffices to show that some of the arguments are incorrect. For example, appellants' assertion that a patent owner is a trustee for his exclusive licensee is supported by none of the cases cited (Br. 36-37). What *Ind. Wireless Co. v. Radio Corp.* 269 U.S. 459 (1926) carefully says (p. 469) is that the patentee holds title in trust for his licensee "to the extent that he must allow the use of his name as plaintiff" in any action for infringement "brought at the instance of the licensee", since a licensee cannot himself sue for infringement. The other cases cited, while cases of patents held in trust, have nothing to do with licenses. In any event, once the license ceases by its terms, any relation of trust would cease.

22. "Where defendants, who are themselves innocent of any act of wrongdoing, are shown by the pleading to have acquired the legal title to property, it is incumbent upon a plaintiff, seeking to establish a superior equitable title, to plead and prove that the defendants are not innocent purchasers for value. In this respect the rule differs from the case where an innocent purchaser for value seeks to establish a superior equitable title against the holder of the legal title, in which case the burden of pleading and proof is on the one asserting his rights as a bona fide purchaser.

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"The rule of pleading, and the distinction between the cases of plaintiffs relying on a legal and an equitable title, is elaborately discussed in *Bell v. Pleasant, supra*."

the patent and that the Generator Company's only interest had been merely that of a license *long ago* expired. The first time was in the Alameda suit, where the complaint alleged just that. Since the Generator Company was a party to that complaint, *this was a representation by the Generator Company to Heinz*. This also was adjudicated by the judgment thereafter entered. Therefore, the very least that would be necessary to charge Heinz with notice would be something thereafter occurring. But no such occurrence is claimed.

The second time was in the contempt proceedings. While the Generator Company was not a party to these proceedings, *it knew of them while they were going on and knew that Owens was prosecuting them for his own benefit* (see p. 18, *supra*). if it wished to put Heinz on notice that it still claimed an interest, despite the 1944 judgment and despite Owens' assertion that the patents were his, *it should have so advised Heinz*. It did not do so. *There was no duty on Heinz to inquire behind the judgment*; the duty was on the Generator Company to notify Heinz, *if it claimed an interest despite its representations in the complaint and despite the adjudication*. But, as the Generator Company has admitted (R. 20, 79; Admission to 33):

"[A]t no time after the rendition of the judgment of which Exhibit 2 hereto is a copy did any of the plaintiffs advise H. J. Heinz Company that Owens Generator Company, Inc. or any of the plaintiffs herein still had or claimed to have any license under, or interest in, either said Patent 2,089,412 or Patent 2,236,153".

In the face of these cardinal facts, appellants' contentions evaporate.

They argue (Br. 49) that the Alameda findings gave notice to Heinz of the claimed equity because they found that "Generator Company had 'the exclusive license to manufacture, sell, install and operate vinegar generators of the type covered by the said

patent owned by plaintiff Charles H. Owens' (Finding V, Tr. 209)." This is an incomplete and misleading quotation of Finding V. The findings were made in December 1944, and what Finding V said was (R. 209):

"During all of the year 1940 and the year 1941 plaintiff Owens Generator Company, Inc., by a written agreement between plaintiff Charles H. Owens and plaintiff Owens Generator Company, Inc., was the holder of the exclusive license to manufacture, sell, install and operate vinegar generators of the type covered by the said patent owned by plaintiff Charles H. Owens \* \* \*."

That is, it found that *during a prior period of time, then elapsed*, the Generator Company *had been* an exclusive licensee. But it was found and adjudicated that Owens was the owner.

Appellants next try to liken this case to that of a person who pays a few dollars to a stranger on the street for a diamond ring and therefore should suspect that the seller is a fence or a thief. They argue (Br. 49-51) that Heinz paid so little to Owens in its 1954 settlement with him as to be evidence of guilty knowledge. Heinz paid Owens \$250,000—a very large sum of money. Appellants try to minimize this by preposterously claiming that Heinz received values aggregating \$947,266.00. They make up this sum by saying that Heinz received a release of civil damages in excess of \$375,000, relief from an order requiring it to destroy \$160,000 worth of generators and release of \$526.00 per day from March 24, 1952 to May 15, 1954. But the judgment in the contempt proceedings for \$375,000 damages had been annulled by the Supreme Court of California in *H. J. Heinz Co. v. Superior Court*, 42 C.2d 164, 175, 176, 266 P.2d 5 (1954). Whoever wished to claim damages was relegated to a new suit in which he would have to prove both infringement and damages, with Heinz entitled to a jury and an appeal, "neither of which", as the Supreme Court said, "had been accorded \* \* \* [Heinz] in this [the con-

tempt] proceeding" (*Id.* at p. 175).<sup>23</sup> Similarly, the \$526 per day is a fictitious figure; it is a cavalier projection into the future, after the date of the contempt order, of supposed damages. But the whole basis of the award had been annulled by the Supreme Court. As for the order to destroy the generators, it was not final but had been brought before the United States Supreme Court in hot contest and had already been stayed in that Court (see p. 12, *supra*).<sup>24</sup>

The absurdity of appellants' argument is pointed up by their effort to add another \$195,000 (Br. 50), which, they blandly say, was the value which the Generator Company had placed on the patents. The only basis in the record for that statement is the fact that the Generator Company's income tax return for 1938<sup>25</sup> had listed as its assets "patents" with a figure of \$195,252.00 (R. 256). In 1938 the patent had a life of 16 years to go. In May 1954 it had a life of only 2½ months. In 1938 the Generator Company was in the first flush of enthusiasm of a new company formed to exploit a patent. By 1954 it had been defunct for 13 years; only two generators had ever been sold, one in 1937 to Frank and the other in 1940 to Heinz, and the Generator Company had not made any profit on either (R. 90, 139; Admissions to II-5, 7, 9, 11). In the tax return of each year *after* 1938, no patents, no assets, no values are listed (R. 295-306). To say that the Generator Company's own valuation in 1938 is evidence of any value at all in 1954 is naive.

Appellants assert (Br. 51) that Heinz joined "with Owens in stipulating 'that the facts stated in the foregoing motion are

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23. Moreover, the award had been as damages to Owens, personally.

24. Furthermore the order of destruction was an attempted vindication of the Alameda Court's authority and not compensation to any private party for property rights.

25. Which Heinz knew nothing about until the hearing on its motion for summary judgment in the present case.

true' in support of a false representation 'that the license from plaintiff Charles H. Owens to Owens Generator Company, Inc. was terminated in 1945 and said Owens Generator Company, Inc. has not had any interest in any of said patents since then \* \* \*.' The reference is to the joint motion of Heinz and Owens to the Alameda Court on May 17, 1954 to dissolve the prior injunction and modify the judgment (R. 261, 263). Appellants' quotation from the motion is misleadingly abbreviated. The statement in the motion was "that the license from plaintiff Charles H. Owens to Owens Generator Company, Inc. was terminated in 1945 and said Owens Generator Company, Inc. has not had any interest in any of said patents since then, *as found by this Court in that certain 'Interlocutory Order' of July 13, 1951*" (R. 262). This was not a misrepresentation, for the Interlocutory Order had found (R. 38, Para. II) that the Generator Company had had an exclusive license from Owens but

"\* \* \* said exclusive written license was fully terminated and cancelled during the year 1945, and ever since said termination and cancellation plaintiff Charles H. Owens had been and now is the sole owner and holder of said letters patent, and at no time since that cancellation has any person, firm or corporation held or owned, or does now hold or own, any right or license of any kind or character to manufacture, sell, maintain or operate vinegar generators of the type covered by said letters patent owned by plaintiff Charles H. Owens."

Thus Heinz merely called attention of the Alameda Court to what it had already found *against* Heinz in litigation which Heinz had vigorously litigated up to the United States Supreme Court before settling.

Moreover, appellants' argument is pointless. The essential and dominant fact is that, *prior to the time of the 1954 settlement* between Heinz and Owens, the Generator Company's interest had ceased, *the Interlocutory Order so told Heinz*, and whether it had



ceased by the end of 1941 or in 1945 is of no moment. A court order against Heinz in 1951, telling it that Owens was and had been the *sole* owner for years, cannot be twisted into notice that Owens was *not* the sole owner.

Appellants next argue that Heinz knew that Owens had no right to deal with the patents without the Generator Company's consent (Br. 52) because the Alameda judgment invalidated the 1941 license, among other reasons, for lack of authority from the Generator Company to Owens to execute it. But at the time of that license the Generator Company still had an exclusive license, and the very same judgment held that the Generator Company's license was no longer in effect (see pp. 26-29, *supra*.).

Appellant's final argument (Br. 53, 54) is that because the Alameda Court found Heinz guilty of obtaining a license from Owens in 1941 by misrepresentations, it must be deemed congenitally sinful. But one may not infer fraud on B from a different fraud on A thirteen years earlier.<sup>26</sup>

Appellants cite numerous cases about notice and copiously quote from them in a 24-page appendix. But appellants admit that none involved facts like those here (Br. 48), and none is remotely in point. Two do not even involve questions of notice

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26. Such an argument flies in the face of the presumptions of innocence of a crime or wrong (see Cal. Code Civ. Proc. § 1963(1)) and "of fair dealing which is tantamount to the presumption of innocence in criminal cases", *Pinney & Topliff v. Chrysler Corp.*, 176 F. Supp. 801, 803 (S.D. Cal. 1959, Yankwich, J.). As said in *United States v. Wiggins*, 14 Pet. (39 U.S.) 334, (1840) at p. 348: "and although any number of frauds should be established upon him, still, if the particular act \* \* \* be not shown to be tainted with fraud, it cannot be affected with other frauds." Other frauds may be shown only if contemporaneous or, at most, nearly so, *Cohn v. Mulford*, 15 Cal. 51 (1860).

Appellants add that Heinz was found in the contempt proceedings to have violated the injunction. Since the Generator Company was never a party to the contempt proceedings (see p. 11, *supra*), it cannot invoke a finding therein as evidence of any fact found. Moreover, no finding in the contempt proceedings became final, for the case was still in the appeal process when all orders were vacated and annulled "as if the same had never been made" (Para. 4, R. 266).

of an equity to a purchaser of the legal title.<sup>27</sup> In three the patentee, holding in trust for another, transferred the patent to a firm which he organized, and of which he was a director, officer, manager, or partner, so that his knowledge was the firm's.<sup>28</sup> In three others the purchaser saw with his own eyes, at the very time he took assignment of the legal title, that the patented process was actually then being used by and in the plants of the corporation which was the equity claimant, a fact sufficient to put him on notice that the user had an interest in the patent.<sup>29</sup> In several other citations

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27. *Hamilton v. Kingsbury*, 4 Fed. 428 (N.D. N.Y. 1880) simply held that A, having sold property to B, transferred nothing to C by a subsequent sale of whatever interest he then had because he had nothing left to sell, there being no applicable recording statute requiring recording of the first sale. *L. A. Young Spring & Wire Corp. v. Falls*, 307 Mich. 69, 11 N.W. 2d 329 (1943) was a case where an employee of the plaintiff made an invention belonging to plaintiff under his employment and, learning of this, high executives of plaintiff conspired to have another person obtain a patent on the invention for their personal benefit, suppressing from the company that the invention had been made by its employee.

28. *Continental Windmill Co. v. Empire Windmill Co.*, 6 Fed. Cas. 396 (No. 3142) (N.D. N.Y. 1871); *New Marshall Co. v. Marshall Engine Co.*, 223 U.S. 473 (1912). Similar is *Ambler v. Whipple*, 20 Wall. (87 U.S.) 546 (1874), where one partner in developing an invention excluded the other from the shop and brought in another as partner in his place; the new partnership had all the knowledge of either partner.

29. In *Auburn Button Co. v. Sylvester*, 72 Hun. 498, 25 N.Y.S. 237 (1893), Sylvester was long the superintendent of plaintiff's plant where the patented machinery was used and bought the patent although he suspected that his employer had some interest in it. In *Stanton Mfg. Co. v. McFarland* (N.J. Ch.), 30 Atl. 1058 (1895), the purchaser of an improvement on a patent knew that his assignor was a member of a company which manufactured the patented article. In *Daily v. Universal Oil Products*, 76 F. Supp. 349 (N.D. Ill. 1947) the purchaser not only paid the patentee in stock issued to him as "trustee" but negotiated the purchase in the office of Sunset Oil Company, knowing that the patentee was its president and that Sunset possessed the patents and was currently and successfully using the patented process in two of its plants, and the file wrapper and the documents in the patent office, which the purchaser examined, showed that the process had been developed and used in Sunset's plants (pp. 361, 362). Incidentally, the findings, judgment and opinion in the *Daily* case were later withdrawn and vacated, *Daily v. Universal Oil Products Company*, 79 U.S.P.Q. 258 (1948).

the very instrument of transfer from the patentee to the purchaser informed him of possible rights of another.<sup>30</sup> Three other citations involved oral statements by the transferor to the transferee at or before the time of transfer sufficient to inform it of the probable equity of another.<sup>31</sup> The remaining two citations are likewise not in point.<sup>32</sup>

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30. *Prime v. Brandon Mfg. Co.*, 19 Fed. Cas. 1324 (No. 11,421) (D. Vt. 1879); the very deed transferring the legal title stated the source of the title to be a described conveyance of certain patents "now in use by the Brandon Manufacturing Company", the claimant of the equity. In *Jonathan Mills Mfg. Co. v. Whitehurst*, 72 Fed. 496 (6 Cir. 1896), one of the instruments in the chain of title, recorded in the patent office, recited that "said patent [is] now supposed to be held by the Smith Purifying Company, or its assigns" (p. 497), Smith Purifying Company being the claimant of the equity.

31. *Thompson v. Automatic Fire Protection Co.*, 211 Fed. 120 (2 Cir. 1914): The transferor told the transferee that Thompson had forced him to assign other patents, and that he preferred to keep this particular patent away from Thompson but felt an obligation to offer it to him. *National Cash Register Co. v. New Columbia Watch Co.*, 129 Fed. 114 (6 Cir. 1904): Patterson, the purchaser's officer, had theretofore negotiated with Neer, Kelly and Reynolds to buy several patents in which they had equal interests. Thereafter he bought, from Neer alone, a patent which was an improvement of the foregoing and "The character of its improvement was in itself adapted to recall the information he had received when Neer's earlier machine was offered to him" (p. 119). This was notice that Kelly and Reynolds might have an interest.

32. *Electric Storage Battery Co. v. Gould Storage Battery Co.*, 197 Fed. 745 (W.D. N.Y. 1912); when plaintiff took an assignment of an invention he knew that his assignor had already assigned a similar previous invention by a recorded instrument which covered the broad principles underlying the second invention.

*Kittle Mfg. Co. v. Davis*, 8 C.A. 2d 504, 47 P.2d 1089 (1935): The basis of Atkins' possible knowledge of Kittle's rights to manufacture a bed invented by Davis was that Atkins was president of a company in Chicago which handled beds made by Kittle and knew that Kittle was about to come out with a bed called the "Davis Lightweight Bed" of which Davis claimed to be the inventor.

## **EVEN IF THE GENERATOR COMPANY HAD AN INTEREST IN THE PATENTS IN 1954, IT CANNOT RECOVER FROM HEINZ**

For the reasons discussed, the Generator Company ceased to have rights in the patents long before 1954, at least vis-a-vis Heinz. But even were the fact otherwise, appellants could not recover in this action against Heinz.

### **A. Nothing can be recovered under a constructive trust theory.**

Appellants' "whole theory of the case" is a "constructive trust" theory, that Owens sold corporate assets to Heinz upon which appellants seek to impose a constructive trust. So appellants told the court below at the Pre-Trial Conference (R. 183, 188), and so they state now (Br. 1, 4, 30).

But a suit to impose a constructive trust must have a *subject*. As said in *Mandeville v. Solomon*, 33 Cal. 38 (1867) at 44:

"It is as necessary in establishing and enforcing such a trust that there should be trust property as that there should be a trustee and *cestui que trust*; and indeed the relation of trustee and *cestui que trust* cannot exist or be declared in cases of implied trust, *in the absence of a subject matter to which the alleged trust relates*. The plaintiff must allege that the defendant holds the title or some interest *in certain property* which it is inequitable for him to enjoy as against the plaintiff, for that is the subject matter of the action, and in its absence there is nothing which the Court can order to be transferred to him."

If the patents still existed, it might be argued that the person in whose name they stand of record could be ordered to assign them to whomever is the equitable owner. *But both patents have terminated, the first in 1954, long before the suit was filed, and the second in 1958, shortly afterwards.* Consequently, as said in *Mandeville v. Solomon*, *supra* at 44-45:

"It will be of no value to the plaintiff if transferred to him, and the Court will therefore refuse to order so vain a thing as the transfer of the undivided half of nothing."

Appellants' constructive trust theory is also disposed of by the single obvious question: What corporate assets did Owens turn over to Heinz and Heinz "take" or "intermeddle with"? (Br. 4.)

The only "assets" Heinz obtained from Owens in the 1954 settlement were such rights as *he* had in the patents. It paid nothing to anyone to purchase any rights the Generator Company may have had in any patents. *If* it had any, Heinz simply did not obtain them by the assignment from Owens. Not only did Owens' assignments purport to transfer only what Owens had,<sup>33</sup> but even if they had purported to transfer more than Owens' interest, they could not possibly do so. It is elementary, negotiable instruments apart, that a seller can transfer no better title than he has, *Siebenhauer v. Bank of California Nat. Assn.*, 211 Cal. 239, 241, 294 Pac. 1062 (1930), and this is as true of patents as anything else, *Waterman v. Mackenzie*, 29 Fed. 316, 317 (S.D. N.Y. 1886).<sup>34</sup>

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33. The assignment of the first patent begins:

"WHEREAS, CHARLES H. OWENS desires to transfer and assign to H. J. HEINZ COMPANY, a Pennsylvania corporation, *all his right, title and interest* in and to United States Letters Patent No. 2,089,412 issued August 10, 1937 to said Charles H. Owens covering a vinegar generator." (R. 426)

Then after the words of transfer it proceeds with the following explanation: "the same to be held and enjoyed by the said H. J. Heinz Company, its successors and assigns, for its own use and behoof, and for the use and behoof of its successors and assigns, to the full term for which the Letters Patent have been granted, *as fully and entirely as the same would have been held and enjoyed by Charles H. Owens had this assignment and sale not been made \* \* \*.*"

The assignment of the second patent is in the same form (R. 423).

34. "On the sixteenth of April, therefore, when Sarah E. Waterman assigned all her right, title, and interest to the complainant, she had nothing to assign which could at all change the legal *status* of the parties. She could not vest a clear title to the patent in the complainant, for the obvious reason that she had previously disposed of it, and did not own it."



This is not a case where Heinz received something physical, or tangible, or concrete, like real property, chattels or money. A buyer into whose possession tangible property passes may, in proper circumstances, be liable to the true owner, not by virtue of taking a deed or a bill of sale from one who lacks title, but by virtue of exercising dominion over the physical property. But a patent is only an *intangible* right conferred by the United States to exclude the rest of the world from exercising an invention. *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 186 (1933). As described by Justice Holmes, "A patent is property carried to the highest degree of abstraction—a right in rem to exclude, without a physical object or content." *Holmes-Pollock Letters* (Harvard University Press, Cambridge, 1941), p. 53. A transfer of a patent is nothing but the transfer of a right to exercise an invention without being liable to the assignor for infringement, plus the right to the help of the law in excluding others. An alleged transfer by one who does not possess this intangible right passes nothing whatever. Thus, if the Generator Company had an interest in the patents, Heinz did not get the right to exclude it or others or receive any protection against an infringement suit by the Generator Company if Heinz should exercise the invention covered by the patent.

*It is not claimed that Heinz prevented the Generator Company from exercising any rights under the patents to make, sell or use generators. It is not claimed that the Generator Company ever tried to exercise any such rights, or that Heinz sought to prevent it from doing so. Consequently Heinz ousted the Generator Company of nothing.*

This disposes of appellants' assertion that Heinz's "intermeddling" with properties of the Generator Company imposed "losses" (Br. 30). Since the Generator Company made no effort to exercise the patents, and was not prevented from doing so, it suffered no losses.

Finally, appellants seem to talk about imposing a trust on

"profits". But there were no "profits" flowing from the assignments. *It is not claimed that Heinz used the patents afterwards.* As we have seen (p. 20, *supra*), appellants have disclaimed that this is a suit for infringement, and there is no suggestion in the complaint that Heinz exercised the patents after it obtained legal title to them, or that anyone else wished to exercise them and was prevented by Heinz from doing so or paid anything to Heinz for the privilege.<sup>35</sup>

**B. Appellants cannot base recovery on the fact that the Alameda Superior Court annulled its injunction.**

One of appellants' mysterious claims is that Heinz "inter-meddled with the \* \* \* judgment" of the Alameda Court of 1944 (Br. 29), that the Generator Company "jointly owned the judgment" (Br. 39), which "became itself a property right" of the Generator Company (Br. 32), and that Heinz somehow "destroyed" it (Br. 64) when the Alameda Superior Court in May 1954 modified that judgment by vacating the injunctive provisions *nunc pro tunc* as of the date of original issuance.

There are at least three reasons why the Generator Company has no rights arising from vacation of that injunction.

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35. Nor have appellants ever contended in this suit that Heinz infringed prior to May 1954. In the contempt proceedings brought by Owens, on his own behalf alone, he charged that it infringed *his* rights, but in carrying the contempt proceedings to the United States Supreme Court Heinz was urging that the State Court had no jurisdiction to try such an issue. The settlement between Heinz and Owens precluded a decision of that question by the highest court in the land, and the Alameda court set aside all its orders in the contempt proceedings as if they had never been made (see R. 266). If appellants had even wished to charge Heinz with infringement, they would have had to try the issue *ab initio* in a federal court and establish both that the patents were valid and infringed. The issue of validity had never been tried in any proceeding in the Alameda court, either in the prior case or the contempt proceedings. One of Heinz's grievances that it carried to the Supreme Court of the United States was that it had been denied the right to try that issue. Appellants' counsel are patent lawyers (see Martindale) and doubtless realized that they could never prevail on an infringement charge in a court experienced in such matters. But whatever the reason, appellants did not raise the issue in this case (see p. 20, *supra*).

**1. In law no such injunction may be deemed ever to have existed.**

Every California court has the intrinsic *power* and *jurisdiction* to vacate its own injunctions at any time for any reason. *Sontag Chain Stores Co. v. Superior Court*, 18 C.2d 92, 95, 113 P.2d 689 (1941). The Alameda Superior Court could have annulled its own injunction on its own motion. Since, therefore, its jurisdiction and power cannot be questioned, the only basis for assailing the exercise of that power would be that it was error, but that could be done only by appeal to a higher California court or by application to the Alameda court itself. No such application has ever been made by appellants (R. 109, 142; Admission to XVI-5a). Just as "a Federal court lacks jurisdiction to vacate or set aside judgments or decrees of state courts", *Jones v. Medlock*, 180 F.2d 658, 661, 662 (10 Cir. 1950), *cert. den.* 340 U.S. 819; *Broussard v. Southern Cotton Oil Co.*, 117 F.Supp. 81, 82 (W.D. La. 1953), *a fortiori*, when a state court sets aside its own orders, a federal court, not in the chain of appellate review, cannot reinstate them. So far as this Court or the court below is concerned, the injunction, having been annulled *nunc pro tunc* as of the date of its issuance, never existed.

**2. Appellants have no interest which the injunction protected.**

But quite apart from the foregoing, there is no substance to appellants' claim. An injunction is not "property" or "owned". It is a remedy for protection of someone's rights, and only the person whose rights it protects can rely on it.

Appellants' claim to "rights" in the injunction rests entirely on the fact that the Generator Company was a party plaintiff in the Alameda suit. But this ignores the purpose of modern liberal procedures for joinder of claims and parties (see p. 30, *supra*). The Generator Company was a proper party plaintiff to the Alameda suit in order to obtain declaratory relief that it had not agreed, during the period when it was the exclusive licensee, to give, and had not authorized giving, Heinz a general sublicense

(see pp. 7, 29, *supra*). The part of the judgment giving this declaration—i.e., the portion protecting the Generator Company—was not annulled (see fn. 10, p. 13, *supra*). At pages 8, 9 *supra* we quoted the language of the Alameda complaint which explicitly stated that an injunction was needed and sought to protect *Owens'* rights in the patent and to safeguard him "in utilizing the same in the manner most to his interest as owner thereof." It was not sought nor issued for the protection of any right of the Generator Company in the patents.

If a particular plaintiff has no interest in the rights which an injunction is designed to protect, or if the interest ceases, he cannot enforce the injunction.<sup>36</sup> Thus, 43 C.J.S. Injunctions § 271, at p. 1034, states:

"However, only those who have a present interest in the right or property protected may institute civil contempt proceedings, that is, the offense complained of must be injurious to the rights of plaintiff in the action \* \* \*."

This was applied in *Popsicle Corporation v. Pearlstein*, 168 S.W. 2d 105 (Mo. App. 1943), where the court said (p. 109):

"Generally speaking, proceedings for contempt to enforce a civil remedy and to protect the rights of parties litigant may be instituted by the aggrieved parties, or those who

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36. For example, an injunction against patent infringement, although denominated perpetual or permanent, exists only during the life of the patent and ceases when the patent expires either through expiration of the term for which it was issued or for any other reason. *De Florez v. Reynolds*, 8 Fed. 434, 438 (S.D. N.Y. 1880); *Westinghouse v. Carpenter*, 43 Fed. 894 (S.D. Iowa 1888); *Chapin v. Friedberger-Aaron Mfg. Co.*, 158 Fed. 409 (3 Cir. 1907); *Hughes Tool Co. v. A. F. Spengler Co.*, 73 F. Supp. 154 (W.D. Okla. 1947). Another application of the principle may be found in *Chipman Chemical Engineering Co. v. Reade Mfg. Co.*, 20 F. Supp. 674, (D. N.J. 1937) where an injunction against infringement had issued on a judgment finding certain claims of the patent invalid and one valid. Because the plaintiff thereafter did nothing to disclaim the invalid claims under the disclaimer provisions of the patent law, its patent rights ceased entirely. It was held that plaintiff no longer could enforce the injunction.

succeed to their rights, or some one who has a pecuniary interest in the right to be protected. \* \* \* As for the case of one who relies for his authority upon a pecuniary interest in the right to be protected, such interest must be a present interest, and the offense complained of must be injurious to the rights of the plaintiff in the suit (32 C.J. 504), which obviously could not be the situation in the case at bar, where the Popsicle Corporation had transferred all its rights under its patents long before the commission of the acts by respondents which constituted the basis for complainant's application for a citation for contempt."

If the Generator Company had any interest in the patent at the time the judgment issued in 1944, it ceased to have by March 27, 1945, for, by its own admission, it never thereafter continued in any business (see p. 23, *supra*). In fact, its interest in the patents had ceased before the 1944 judgment. That judgment (1) merely enjoined building and using generators covered by the patents "*owned by plaintiff Charles H. Owens*", and (2) adjudicated that the Generator Company had no interest therein after 1941. Appellants are thus in a dilemma. If the Generator Company and not Owens owned the patent, Heinz was *not* enjoined from making and using any generator thereunder. Conversely, if Heinz was enjoined, it was only by virtue of the fact that Owens and not the Generator Company had the patent.

**3. The Generator Company sustained no damages, and Heinz gained no profits from the annulment of the injunction.**

Annuling the injunctive provisions of the 1944 judgment worked neither profit nor loss, as may be observed by noting what the legal situation (a) would have been had the injunction remained in effect and (b) what it was after the injunction was annulled.<sup>37</sup>

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37. Appellants seem to insinuate that Heinz gained from the annulment of the order that it pay Owens damages and destroy its vinegar gen-



If it had remained in effect, even one whose rights it was intended to protect could not recover damages from Heinz for its violation, unless Heinz infringed the patents, it being an injunction against infringement. *H. J. Heinz Co. v. Superior Court*, 42 C.2d 164 at 169, 170, 172, 266 P.2d 5 (1954). And appellants disclaim infringement (see p. 20, and fn. 35, p. 46, supra).

Moreover, by May 1944 (when the injunction was annulled), any claim for damages for violation of the injunction had already been barred by the statute of limitations. Such a claim may be asserted only in a civil suit, *H. J. Heinz Co. v. Superior Court*, supra, at p. 175, in which the period of limitations is 4 years, either under Cal. Code Civ. Proc. § 337 (1) or § 343, and begins to run *from the first invasion of the party's rights* and is not extended by continuation of the invasion. *Italiani v. Metro-Goldwyn Mayer Corp.*, 45 C.A. 2d 464, 114 P.2d 367 (1941); *Thompson v. California Brewing Company*, 150 C.A. 2d 469, 310 P.2d 436 (1957); *Campbell v. Scholl*, 129 C.A. 2d 300, 376 P.2d 834 (1954); *Judson Pac. M. v. Thew Shovel Co.*, 127 C.A. 2d Supp. 828, 830, 275 P.2d 841 (1954). Here the generators which constituted the claimed violation of the injunction were built and their use was begun prior to the commencement of the contempt proceedings in September 1949 (Complaint, Para. 26-28; R. 7, 8), more than four years prior to the settlement of May, 1954.

Conversely, eliminating the injunction left untouched the underlying rights the injunction protected. To recover for violation of the injunction one would have to prove violation of those rights,

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erators. But the annulment of the order for damages had already been effected by the California Supreme Court in *H. J. Heinz Co. v. Superior Court*, 42 C.2d 164, and the destruction order had been both entered and annulled in the contempt proceedings. Appellants have no standing to complain of that, since (1) the Generator Company was not a party to the contempt proceedings (see p. ...., supra); and (2) the contempt orders had been made upon an adjudication that any rights ever possessed by the Generator Company had expired at a date long prior to the building of any generators by Heinz (see p. ...., supra).

i.e., patent infringement. But if infringement were claimed and proved, the injured party could still recover the same damages whether there was a superimposed injunction or not.<sup>38</sup>

Thus, no matter how the subject is examined, appellants can find no monetary significance in the annulment of the 1944 injunction. The subject is either a red herring or an attempt to have a federal court award a money judgment against Heinz on the basis of a state court injunction for violation of which the state court itself could not grant any such award. *H. J. Heinz Co. v. Superior Court*, *supra*.

**C. Nor can appellants recover because Heinz paid money to Owens.**

Appellants have hinted and nibbled at many diverse ideas, and one seems to be that Heinz's payments to Owens of \$250,000 in the 1954 settlement of its controversies with him gave appellants rights against Heinz. *If* Owens was a fiduciary to the Generator Company, it may be that it can compel him to account for some or all of this sum. That is no concern of Heinz. But appellants cannot ask Heinz to pay a further sum to them simply because it paid something to him.

Heinz paid a sum to Owens for a release of *his claims* and further sums for transfer of *his* interest in the patents. It paid nothing to anyone for a release of claims that the Generator Company may have had, *if* it had any. If the Generator Company had any claims against Heinz, they simply remain unreleased. Because John Doe pays Roe for a release of Roe's claims against Doe does not impose any obligation on Doe to pay something to Smith. Or, because Doe buys from Roe such rights as Roe

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38. The only effect of existence of an injunction, apart from jurisdictional questions, is that the court issuing it could impose a fine, payable to the State but not the litigant, to vindicate the court's authority. No private party has a standing to protest if a court concludes that its authority and dignity need no such vindication.

may have had in property imposes no obligation on Doe to pay Smith for any rights Smith may have in it.

Stripped of legalisms, appellants' claim is on a par with a claim that the country bumpkin who "buys" the Golden Gate Bridge from a swindler must pay a further sum to the Bridge Authority because he gave the funds to the wrong man.

*Daily v. Universal Oil Products Co.*, 76 F. Supp. 349 (N.D. Ill. 1947), appellants' most frequent citation, confirms what is said above. There Sunset Oil Company was the equitable owner of certain patents issued to Dubbs, who owned 750 shares of its stock, plaintiff's predecessor owning 250 shares. While Sunset was still in existence and in business, and therefore still the owner or licensee of the patents under the terms of the license agreement, and while Dubbs was still its president, he purported to assign the patents to Universal for a consideration of 300 shares of its stock, which he received as "trustee". The certificate recognized that Dubbs held it, not personally, but as *trustee*. Nine years after his death his widow purported to sell the stock to Universal's president. In permitting the transfer of the stock on its books, Universal issued a new certificate which said nothing of the trust and allowed an ultimate purchase by a *bona fide* purchaser. The court did not hold Universal liable to the plaintiff because it had paid consideration, i.e., stock, to Dubbs for the patents. The court noted that Universal had committed no wrong and was liable to no one by virtue of what had happened *up to the point* when it took action to destroy the trust by cancelling the shares which had been issued to Dubbs as trustee and issuing a new certificate in the name of his widow personally.<sup>39</sup>

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39. The court said:

"plaintiff \* \* \* contends that Sunset \* \* \* owned the patents \* \* \* and seeks to ratify the transfers of the patents to Universal \* \* \*"  
(p. 360).

"Universal \* \* \* was formed and Dubbs traded the three tenths in-

**D. The Generator Company was put to the election of affirming or disaffirming the assignments to Heinz, and it affirmed.**

The *Daily* case points to another defect in appellants' case. As we saw at pp. 34, 35, *supra*, the interest of the Generator Company, if any, was solely an equitable one. When the legal owner transferred the patents, the equitable owner (if such it was) had the right to affirm the transaction as made on its behalf or to disavow it.

If it affirmed, it could seek an accounting of the proceeds from Owens, as its agent. But an affirmance would be a ratification of the transaction as a transfer of its interest to Heinz. Ratifying, it could seek nothing further from the transferee.

Conversely, if it disaffirmed, then, if the Generator's equity was not cut off by lack of notice, the settlement would be as if it were non-existent so far as the Generator Company was concerned. It would take nothing from the Generator Company and would confer nothing on it. The Generator Company would remain the owner of whatever interest it had, if any, but it would have no claim against Heinz by reason of the settlement between Heinz and Owens.

terest for three hundred shares of the company's stock. He expressly acknowledged the trust in regard to the three hundred shares when the certificate was issued to Jesse A. Dubbs, trustee. *To this point, Universal and its officers may not have been subject to criticism \* \* \** This is the deal which plaintiff has asked the Court to confirm and recovery, if any, must be limited to that.

"Turning to plaintiff's contention that Universal \* \* \* and its officers are liable to the plaintiff because they participated in the violation of a trust when the company transferred the three hundred shares from the record holder, Jesse A. Dubbs, trustee \* \* \*." (p. 367, 2nd col.).

"*At this point*, Universal \* \* \* participated in the destruction of a trust of which it had actual knowledge and in the conversion of the subject matter of the trust. The company and its officers knew that the original certificate for the three hundred shares was issued to Jesse A. Dubbs as trustee \* \* \* Without lifting a finger to ascertain the real owners of the three hundred shares of stock, they allowed them to be converted by issuing a new certificate for the stock to men who were strangers to the stockholders of Sunset \* \* \*." (369, 1st col.)

The fact is that the Generator Company did *affirm* the transaction, and in two ways. We call attention to the facts stated in item (t) on p. 19, *supra*. Tobin testified that he did not bring suit in 1954 because he assumed that the Generator Company "was going to share in that check" (for \$250,000) which Owens received from Heinz. A readiness to accept from Owens a share of the settlement proceeds, so long as he thought Owens would share, is an affirmation of the settlement. *It relegates appellants to a remedy, if any, against Owens and Lowenthal alone.*

Secondly, when the Generator Company learned of the 1954 settlement, it not only had the right, if it claimed any interest in the patents, to disaffirm any supposed transfer of its rights, but it was *incumbent* on it to do so promptly. One may not postpone the exercise of a right of disaffirmance until the eve of the lapse of the statute of limitations. The controlling law is settled in a comprehensive opinion in *Leeper v. Beltrami*, 53 C.2d 195, 211, 347 P.2d 12 (1959). It was there held that in any suit in which, *however the theory is stated or however phrased*, the plaintiff must disaffirm for any reason in order to recover, he must comply with the rules requiring rescission to be *prompt*. There the suit was based on duress. Although held not barred by the statute of limitations, the action was held barred, on demurrer, for failure to rescind within *two* years. And failure to disaffirm promptly is, in law, affirmation and ratification. In *Sogg v. Harvey*, 134 C.A. 2d 116, 121, 285 P.2d 104 (1955), it was said:

"The transaction is ratified by failure to rescind promptly after discovery of the facts which entitle the party to rescind."

At pages 18, 19, *supra*, we have shown the following facts: A year before Owens' settlement with Heinz in May 1954, appellants knew that Owens was having litigation with Heinz. In January or February 1954, several months before the settlement, Tobin was told that Owens was winning this litigation. As early as June 1954 Tobin was told that Owens had settled, and Tobin



told others that the Generator Company should sue to assert its rights. During all this time no claims were asserted against Heinz, and no effort was made to communicate with Heinz or Owens. Appellants not only delayed suing until June 1957; they failed even to give notice of disapproval of the 1954 transaction, which could have been done at once and without an attorney. This failure was fatal within the direct holding of *Leeper v. Beltrami*, *supra*.

### III.

#### THE CASE IS BARRED BY THE STATUTE OF LIMITATIONS AND LACHES

Finally, we submit, appellants' case against Heinz is barred by lapse of time. The basic relevant facts have been set forth in the Statement of Facts at pp. 13-20, *supra*.

#### A. The statute of limitations.

##### 1. The statute began to run long before the settlement of 1954.

The foregoing enumeration of facts shows that

- (i) basic elements of any possible case were already barred by statutes of limitations long prior to 1954; and
- (ii) the alleged fiduciary—Owens—had openly repudiated any fiduciary obligation to the Generator Company and any supposed rights of the Generator Company, to its knowledge, long before 1954.

While appellants argue that Owens was a fiduciary, it is elementary that where a fiduciary repudiates the relation or denies rights or claims of the alleged beneficiary to the latter's knowledge, the beneficiary is no longer excused from the duty of acting to protect its claims, and the statute of limitations begins to run. *Bennett v. The Hibernia Bank*, 47 C.2d 540, 559, 560, 561, 305 P.2d 20 (1956).

(a) The second patent.

Appellants' claim to the second patent is a claim of an equitable interest, whether resting on a document unrecorded in the patent office or on the supposed fiduciary relationship (see pp. 33, 34, supra). The fact detailed in item (a) on p. 14, supra show that Owens *never* recognized any interest of the Generator Company in or to the second patent, and that any such claim was *repudiated and denied* by Owens to the Generator Company's knowledge *immediately* when the application for the patent was filed in 1938, again when the patent was issued in 1941, and *continuously thereafter*. This was the reason Tobin became and remained antagonistic to Owens ever since 1938. From the moment the patent issued Tobin believed that the Generator Company should sue Owens to establish its claims to or in the patent, but it never did so. Tobin and the Company not only knew of Owens' repudiation in 1938 and 1941 of any interest of the Generator Company, but they also obviously knew of it again when the judgment in the Alameda action adjudicated that Owens owned *both* patents. The very filing of that action by Owens was itself repudiation of any right in the Generator Company. *Bennett v. The Hibernia Bank*, 47 Cal. 2d 540 at 560, headnote 22. The statute of limitations ran against any attempt to impress an equitable title on Owens' second patent in 4 years, and thus barred any such claim, at the latest, in 1945.

(b) The first patent.

The difference between the first and second patents is that while Owens never recognized any interest of the Generator Company in the second patent, the Generator Company originally had, and was recognized as having, an interest in the first. But by letter in 1942 Owens repudiated that interest. In 1943 the Generator Company knew that in litigation to which it was a party Owens again repudiated any interest of it. It knew by the adjudication

of 1944 that he alone owned the patent. It knew by his letter of 1945 that he repudiated every conceivable connection with the Generator Company. Thereafter 13 years elapsed, with the Generator Company doing nothing to assert any rights,—uninterested, though aware of Heinz's new litigation with Owens.

The Generator Company was under a duty of prompt action which was especially rigorous in view of the termination of its charter. Under New Jersey law (N.J. Stat. tit. 14, ch. 13, § 5) on dissolution the directors became liquidators empowered to settle the affairs of the corporation. Appellants Wittmer and Tobin, as directors, thus became liquidators of the Generator Company in 1943.<sup>40</sup> It is in this capacity that they filed this suit in 1957, and it would have been just as easy for them to have filed suit against Owens years ago. The statute did not merely confer on them the power to settle the affairs of the corporation, collect its assets and divide them among the stockholders. The conferred power correlatively imposed the "equal duty" to do so. *Aetna Cas. & Surety Co. v. International Re-insurance Corp.*, 117 N.J. Eq. 190, 175 Atl. 114 (1934); *Stuart v. Chaney*, 78 Colo. 421, 242 Pac. 638, 639 (1925). Directors of a dissolved corporation are chargeable for neglecting to collect its assets, *Hewson v. Chas. P. Gillen & Co.*, 142 Atl. 250 (N.J. Eq. 1928). In *McClean v. Bradley*, 282 Fed. 1011 (N.D. Ohio 1922), involving a defunct New Jersey corporation whose assets consisted of patents, the franchise of the corporation was revoked by the State of New Jersey, as here. Thereupon, the court said:

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40. It is on the basis of this very New Jersey statute that appellants (Br. 32) claim that Owens became one of the statutory trustees to take possession of the company's property and liquidate. But, as said in *McClean v. Bradley*, 282 Fed. 1011 (N.D. Ohio 1922) (involving a New Jersey corporation and the New Jersey statute), the surviving directors are not trustees in the sense that limitations and laches will not run in their favor. Lowenthal's letter to Lasher of May 14, 1943 (see p. 15, *supra*), written several months after the corporate dissolution, was a repudiation by Owens of any duty to act as a liquidator, for it said that Owens "has no intention whatever \* \* \* of carrying on any further activities on behalf of the Owens Generator Company."

"[B]y the laws of that state the members of its last board of directors \* \* \* became trustees for the settlement and determination of its affairs. It was *their duty* to get in the outstandings, reduce them to cash, pay the creditors, and distribute the balance, if any, to the stockholders." (pp. 1016-17.)

The revocation of the Generator Company's charter on January 19, 1943 brought this section of New Jersey law into operation. *Watts v. Vanderbilt*, 45 F.2d 968 (2 Cir. 1930). *At that moment*, then, a *duty* was imposed on Wittmer and Tobin to act diligently. They were under the duty of acting promptly in 1943, when the Generator Company had its charter revoked, to collect, realize, and reduce to possession all claims and assets. While the rule that means of knowledge is equivalent of knowledge is qualified by a proviso that this is so only where there is a duty to investigate, *here*, in 1943, *was the duty to investigate* imposed by statute. Knowing that Owens was denying all rights of the corporation (see pp. 15-18, *supra*), it was their duty to do everything necessary to protect the corporation. Yet they lay in lethargy for 14 years, doing nothing, *not even recording the patent license of 1938 in the patent office*.

In *Landis v. Saxton*, 105 Mo. 486, 16 S.W. 912 (1891), the corporation had expired in 1875. In 1887 the last surviving director, acting as trustee under a statute similar to the New Jersey statute, sued the former secretary and treasurer to recover a sum of money. The action was held barred by the statute of limitations, even though the secretary was a fiduciary. Said the court (p. 913):

"Again, the cause of action in this cause arose upon the dissolution of the corporation."

We submit that the statute of limitations began to run years ago against suits to impress equities on the patents.

**2. Even if the cause of action were held not to accrue until the settlement of May 1954, the statute of limitations ran.**

Even on appellants' theory that the gravamen of their suit is the 1954 settlement and that this suit is an action for fraud, they are barred. The applicable statute would then be Cal. Code of Civ. Proc. § 338(4), and the statutory period 3 years after "discovery". Since tolling of the statute until discovery is an exception to the basic rule, it is elementary that the *burden* of *proving* lack of discovery earlier than 3 years is upon the party asserting lack of discovery. *Heffron v. Duggins*, 115 F.2d 519, 520 (9 Cir. 1940); 31 Cal. Jur. 2d, Limitation of Actions § 257 at p. 674; *Merchants Ice etc. Co. v. Globe Brew. Co.*, 78 C.A. 2d 618, 623, 177 P.2d 963 (1947).

The settlement was in mid-May 1954. This suit was filed, over 3 years later, June 18, 1957. Tobin testified that he learned of the settlement on June 24, 1954. This fell short of 3 years *by only 6 days*. On this 6 days and on Tobin's testimony of when *he* learned, appellants hang their hope of avoiding the statute of limitations. But this testimony falls far short of discharging the burden or even raising an issue of fact. In the first place, Wittmer was as much a liquidator of the defunct company as Tobin, and appellants have remained secretive about when Wittmer learned. In the second place, the liquidators act for the benefit of the stockholders, the principals and real parties in interest and the equitable owners of the assets, *State v. Fidelity Union Land Co.*, 25 N.J. 387, 136 A.2d 636, 641 (1957), and appellants have remained silent about when the stockholders learned. Indeed, as we have seen (p. 18, *supra*), Tobin's testimony was that he learned of the settlement from Jack Revere, who was Tobin's cousin, the son and nephew of the Elizabeth Revere and Theresa McCurry who had put up \$4000 of the only money—\$5000—invested by *any* stockholder, and for whom Tobin acted as agent in the company's affairs. Jack Revere learned of the fact while in New Jersey (R. 476, 477). Thereafter he came west to Colorado



Springs (R. 468, 476), spent several days visiting people (R. 469), and it was while there that he told Tobin (R. 468). The burden was on appellant to show that the Reveres had not learned of it more than 6 days before. But appellants, though required by the motion for summary judgment to produce evidence on the subject, remained silent.

## **B. Laches.**

While the statute of limitations requires lapse of exact periods of time, laches is not concerned with a fine count of days,—6 more or less are of no significance. When a claim is in equity, limitations will bar it if the precise time stated in the statute has elapsed, but laches will do so even though less than the precise time has elapsed.

Since laches is available on demurrer, *Warfield v. Anglo & London Paris Nat. Bank*, 202 Cal. 345, 356, 260 Pac. 881 (1927); *Chilberg v. City of Los Angeles*, 54 C.A. 2d 99, 101, 128 P.2d 693 (1942), it is, *a fortiori*, available on a motion for summary judgment. "Nothing can call a court of chancery into activity but conscience, good faith and reasonable diligence," *Warfield v. Anglo & London Paris Nat. Bank*, supra, at p. 356. Laches often arises from delay less than the statute of limitations, *Warfield v. Anglo & London Paris Nat. Bank*, supra, at pp. 356-357; particularly where action in the nature of rescission is necessary, *Chilberg v. City of Los Angeles*, supra at p. 102 (delay of 2 years, 2 months, 4 days); *Coachella Valley Lumber Co. v. Hollenbeck*, 145 C.A. 2d 722, 729, 303 P.2d 98 (1958) (one year). "[D]elays for much shorter periods than a year have been held to be fatal", *Sogg v. Harvey*, 134 C.A. 2d 116, 121, 285 P.2d 104 (1955). As said in *Wells Fargo Nevada Nat. Bank v. Barnette*, 298 Fed. 689, 692 (9 Cir. 1924):

"In numerous cases laches have been held a bar, where the delay in applying for equitable relief has been less than the time limit of the statute of limitations. \* \* \* In *Baker*

*v. Cummings*, 169 U.S. 189 \* \* \* it was held that 3 years' delay by the plaintiff, in a case where to his knowledge the defendant *was proceeding to prosecute certain claims as his own*, debarred the plaintiff from proceeding in a court of equity to assert his rights. So in *Patterson v. Hewitt*, 195 U.S. 309, 319 \* \* \* the court observed that in some cases the diligence required is measured by 'months rather than by years,' and that 'a delay of 2, 3, or 4 years has been held fatal.' "

This statement is applicable, since the Generator Company knew for years that Owens was proceeding to prosecute certain claims against Heinz as his own.

Laches does not require *an estoppel* but is addressed to the conscience of the court and rests in its discretion, *Gillons v. Shell Oil Co.*, 86 F.2d 600, 607 (9 Cir. 1936).<sup>41</sup> The doctrine is applied with particular *rigor where the subject matter is not known to have any value until someone by his efforts demonstrates that it has*. It is thus a doctrine often applied in oil or mining ventures. As said in *Hamud v. Hawthorne*, 52 C.2d 78, 86, 338 P.2d 387 (1959):

"It was not until plaintiffs learned of the interest of an oil company in the subject property that they bestirred themselves to ascertain whether such property was worth an effort on their part to reclaim it."

The court there quoted from *Livermore v. Beal*, 18 C.A. 2d 535, 64 P.2d 987 (1937), *cer. den.* 302 U.S. 712, where judgment on demurrer, for laches, was affirmed, the court saying (p. 549):

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41. "[T]he appellants have confused the defense of estoppel with that of laches \* \* \*.

"It is well settled, however, that the two defenses are governed by different rules. \* \* \* 'While in many instances the facts that are held to constitute laches are such as would create an estoppel, more frequently they are not. \* \* \* The defense of laches is directed more intimately to the conscience of the chancellor, and whether it shall prevail rests in his discretion.' "

" 'No doctrine is so wholesome, when wisely administered, as that of laches. \* \* \* *It requires of every owner that he take care of his property, and of every claimant that he make known his claims.*' \* \* \* [O]ne is not permitted to stand by while another develops property in which he claims an interest, and then if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing that the losses incurred in the exploration be borne by the opposite party. This thought was expressed in one case by the following language. 'If the property proves good, I want it; if it is valueless, you keep it.' "

Appellants' conduct is precisely like that described in *Homestake Mining Co. v. Mid-Continent Exploration Company*, 282 F.2d 787 (10 Cir., 1960), in which, because of a delay of less than 19 months, the court refused to impose a constructive trust for breach of fiduciary obligation, saying:

"Instead of asserting any claimed right, they waited until the enterprise was successful and then swarmed in to recover the windfall which their associate made possible by its skill, ingenuity and daring.

\* \* \* \* \*

"It is not equity, but injustice, to permit a person to withhold a claim to a mining enterprise and then to reward him with the profits made possible by the action of another." (p. 801).

Aware, for years, of Owens' repudiation of any rights of it, knowing that Owens was pursuing litigation with Heinz, the Generator Company asserted no claims, contributed no finances, ran no risk of liability for costs if the litigation proved unsuccessful, incurred no liability for attorneys' fees, but lay still until Owens' persistence in harassing Heinz with litigation collected a settlement from Heinz, and then waited for still another 3 years.

See also: *Kleinclaus v. Dutard*, 147 Cal. 245, 81 Pac. 516 (1905) (suit to impress a trust held barred for laches on de-

murrer, alleged trustee having "dealt with all property acquired as absolutely his own", p. 250).

*Morrow v. Coast Land Co.*, 29 C.A. 2d 92, 84 P.2d 301 (1938), one of a series of suits to establish an interest in Kettleman Hills oil property based on a claim that Ochsner had acted for the claimants. Ochsner had applied to the government for a prospecting permit *in his own name* in 1920, it was issued *in his own name* in 1921, and assigned by him in 1923, all acts inconsistent with his alleged duty to plaintiffs.

*King v. Los Angeles County Fair Association*, 70 Cal. App. 2d 592, 596, 161 P.2d 468 (1945), where in a suit by shareholders in a defunct corporation to set aside a transfer of the assets of the corporation to a successor, judgment for the defendant on a demurrer for laches was affirmed, suit having been filed 2 years and 1 month after the event. The court said (pp. 596-597):

"The obligation on the part of these plaintiffs to act promptly if they desired equitable relief against the transfer of the assets is analogous to the duty of one who desires to rescind a contract because of misrepresentation and fraud to give notice thereof promptly. There are many cases in which delays for a shorter period than a year have been held fatal to the right to rescind. \* \* \* Under the circumstances of this case it clearly appears that the plaintiffs waited an unreasonable length of time before seeking equitable relief."

In *Lillard v. Walsh*, 172 C.A. 2d 674, 342 P.2d 82 (1959), a suit to establish a constructive trust was held barred by laches for a delay of less than the period of limitations.

If the Generator Company did not have full knowledge more than three years before suit, it was because it deliberately closed its eyes and its ears, as epitomized in Tobin's testimony. Referring to a visit of the Owenses to his own home in 1946 or 1947, where his wife and the Owenses were engaged in discussion, he said,

"I would put myself in the position that I wouldn't listen."  
(R. 491)

Knowing of the litigation between Heinz and Owens, the Generator Company had the duty to follow what was happening. Such is the diligence that men of common prudence would exercise for their own protection. *Beresford v. Horn*, 127 C.A. 2d 89, 273 P.2d 302 (1954). As said in *Phelps v. Grady*, 168 Cal. 73, 80, 141 Pac. 926 (1914):

" 'Parties cannot thus, by seclusion from the means of information, claim exemption from the laws that control human affairs and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition and of the vicissitudes to which they are subject.' "

#### IV.

### **ANSWER TO THE CONTENTION THAT SUMMARY JUDGMENT SHOULD BE DIRECTED FOR APPELLANTS**

With respect to appellants' further contention that this Court should direct summary judgment for them and against Heinz, our answer may be brief.

1. We have submitted that the judgment should be affirmed.
2. An appellate court, though it reverse a summary judgment for appellee, cannot direct it for an appellant who, like appellants here, had not moved for judgment below. This precise point was settled in *Fountain v. Filson*, 336 U.S. 681 (1949).<sup>42</sup> See also *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525, 533 (1958). The reasons are obvious: (1): although "defendant

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42. Except for one case where an appellate court *affirmed* a judgment upon grounds other than those on which the District Court based it, all appellants' citations (Br. 62-63) pertain to the power of a District Court (not an appellate court) to grant a summary judgment against the party moving for it. In *Fountain v. Filson*, *supra*, the Supreme Court expressly refrained from passing on that question as not pertinent.



may, on his motion, assert that, accepting his legal theory, the facts are undisputed, he may be able and should always be allowed to show that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists." *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2 Cir. 1946), cer. den. 328 U.S. 870. See also *Hycon Manufacturing Co. v. H. Koch & Sons*, 219 F.2d 353 (9 Cir. 1955). (2) Where no motion for judgment has been made below by appellant, appellee has never been called on to make that showing.

3. Were appellants' legal theory accepted here, many issues of fact would exist. For example, appellants' claim against Heinz requires them first to establish a fiduciary relationship between themselves and Owens and violation of it by him. This issue was never reached by the District Court and remains undecided.<sup>43</sup> It involves not only the testimony of Tobin but of his adversaries Owens and Lowenthal (whose depositions have all been taken) and mutual charges and recriminations. Another example is the statute of limitations. We have seen that even on appellants' theory, the effort to escape the bar of the statute of limitations rests wholly on the testimony of Tobin that he learned of the settlement on June 24, 1954, just 6 days within the 3 year period. (See p. 59 supra.) The trial court—the finder of the fact—might well disbelieve Tobin, particularly in the light of all the other evidence. The determination of Tobin's credibility, if it should be material, would lie with the trial court. *Byrd v. Blue Ridge Cooperative*, 356 U.S. 525, 532 (1958).

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43. The District Court said: "Whether Owens, as fiduciary of the Generator Co., breached any duty to the company by his actions in the matter is of no consequence in this motion for summary judgment by Heinz." (R. 315)

**CONCLUSION**

We respectfully submit that the judgment should be affirmed.  
Dated: San Francisco, November 6, 1962.

MOSES LASKY  
RICHARD HAAS  
BROBECK, PHLEGER & HARRISON

*Attorneys for Appellee  
H. J. Heinz Company*

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MOSES LASKY

**(Appendix follows)**





## *Appendix*

### **OPINION OF DISTRICT COURT (R. 307)**

[Caption omitted]

#### **Order Granting Motion for Summary Judgment**

Defendant H. J. Heinz, Company, on June 13, 1960, filed its motion for summary judgment pursuant to F.R.C.P. 56(b). Oral argument on the motion was heard September 23, 1960, and memorandum in support and opposition were filed by the parties subsequently.

From a perusal of the pleadings, affidavits, depositions, answers to interrogatories, admissions, exhibits and the memoranda of counsel, it appears that the case is based upon a theory of constructive trust. It is plaintiff's claim that the Owens Generator Co., (hereinafter referred to as Generator Co.), owned certain assets, particularly two patents, and an injunction. The first patent, No. 2089412, was for a vinegar generator. It was obtained in the name of defendant Charles H. Owens, (hereinafter referred to as "Owens"), on August 10, 1937. The second patent, covering improvements to the generator, No. 2,236,153, was issued in Owen's name on March 25, 1941. The injunction was issued in 1954 and is noted, *infra*.

On March 10, 1938, the plaintiffs Tobin and Witmer and defendant Owens formed the Generator Company and contemporaneously with its formation defendant Owens executed an instrument in regard to the first patent, among other provisions thereof being the following:

"\* \* \* the sole and exclusive right, privilege, and license within the United States to manufacture, sell, install and operate vinegar generators containing the said patented improvement, and any and all improvements thereon, for so long as said [Generator Company] shall continue in business, or to the end of the term for which the said letters



patent, or any extensions thereof, were granted, whichever event shall first occur \* \* \*."

Subsequently, Owens developed the second patent.

During the latter part of 1938 and the early part of 1939, the H. J. Heinz Company became interested in purchasing a vinegar generator from the Generator Co. A purchase was negotiated in 1939. In 1941, Heinz obtained from defendant Owens a written license to build other generators under the first Owens' patent. In 1943 suit was brought by defendant Owens and the Generator Co., to rescind and cancel the license of 1941. The action was instituted in the Superior Court of Alameda County (Civil No. 175935) and resulted in a judgment in their favor against defendant Heinz.

On September 8, 1949, Owens, with defendant Morris Lowenthal as his attorney, instituted civil contempt proceedings against Heinz in the Alameda Superior Court charging Heinz with violating an injunction issued in 1944 in the action by Owens and the Generator Co., against Heinz, which precluded Heinz from building any generators under the 1941 license. The Court therein found that Heinz had violated the injunction and issued an interlocutory order granting damages to Owens and ordering Heinz to destroy the generators built in violation of the injunction. Subsequently, the California Supreme Court annulled the contempt order insofar as it awarded damages but sustained it as to destruction of the generators. *Heinz Co. v. Superior Court*, 42 C.2d 164 (1954).

Heinz then obtained a stay pending filing of petition for certiorari from Justice Douglas of the United States Supreme Court. Before filing the petition, the matter was settled.

On May 15, 1954, Owens assigned his entire interest in the first and second patents to Heinz and released Heinz from claims of violation of the injunction and from the effects of the contempt order.

The assignment recited that Owens “\* \* \* by these presents does sell, assign, transfer and set over unto said H. J. Heinz Company, its successors and assigns, *the entire right, title and interest in and to*’ the first and second patents \* \* \*”

In settlement, Heinz paid to Owens \$250,000.

On May 17, 1954, Owens and Heinz, in the California Superior Court action, brought a series of motions and obtained an order dissolving the 1944 injunction. (Civil No. 175935, May 17, 1954, Motion to dissolve Injunction and Modify Judgment, Civil No. 175935—Order dissolving Injunction and Modifying Final Judgment. Exhibit “C” to plaintiff’s op. brief).

Plaintiffs now seek to impose a constructive trust on “profits” held by Heinz derived from the May, 1954 transaction. (Plaintiff’s op. brief, pg. 39). It is plaintiff’s contention that Heinz acted with full knowledge of the Generator Co.’s interest in the patents and of a breach of fiduciary relationship between defendant Owens and the Generator Co.

The only interest the Generator Co. ever had in the first patent is evidenced by the agreement from which the quotation above is taken. Plaintiff contends that the construction and operative effect of the above provision and the occurrence of the event which it contemplates are fact issues which cannot be determined on this motion. However, there appears nowhere in the material before the Court any genuine material issue of fact in regard to the agreement in dispute. Whether it is termed a “grant” a “license” or an “assignment” does not change the legal effect of its provisions, and it is clearly within the province of the Court to determine the legal effect in a motion under F.R.C.P. 56(b). The contract here is unambiguous, and in construing the provision no issue of material fact appears to bear on the resolution. *Simpson Bros. v. District of Columbia*, 179 F.2d 430 (Col. D.C. 1949) cert. den. 338 U.S. 911 (1950).

We only decide on this motion the effect of the provision of the agreement as to Heinz.

In this posture, it is clear that the construction of the agreement is a question of law. *Fox v. Johnson and Wimsalt*, 127 F.2d 729, 736 (Col. D.C. 1942).

Whether defendant Owens had waived rights under the agreement or otherwise acted to change the application of the provisions as to him does not concern the Court here. If the agreement is construed as a license to the Generator Co., it is well settled that it would terminate when the Generator Co., ceased to exist legally. A patent licensing contract is personal to the licensee and terminates with the life of the licensee. Thus when the corporation ceased to exist, so did the license. *Haffcke v. Clark*, 50 F. 531, 536 (CCA 4, 1892); *Kenyon v. Automatic Instrument Co.*, 63 F. Supp. 591 (D.C. Mich. 1945).

Construing the agreement as an assignment of the legal ownership of the patent, the words of the assignment control: "For so long as said (Generator Co.) shall continue in business." The agreement, as it stands written, ceased automatically by operation of law when the events upon which it is conditioned came to pass. *Pierpont Boiler Co. v. Pen. Iron & Coal Co.*, 75 F. 289 (N.D. Ohio E.D. 1896).

When the Attorney General of New Jersey enjoined the company from transacting any business by order of November 25, 1941, (Exhibit I to Lowenthal-Owens answer and complaint), the company ceased to have an interest in the patent insofar as the plain words of the agreement are concerned. Assuming that the Generator Co., could transact some business in the way of winding up between November 25, 1941 and January 19, 1943, it is undisputed that on the latter date it ceased to have any existence at all for any purpose, for on that date the charter of the company was revoked by the Governor of New Jersey. (Lowenthal-Owens Answer, pg. 29, lines 21-27).

Therefore, as to defendant Heinz, any dealings with Owens in relation to the first patent would, and properly could, be carried out in good faith and belief that Owens was the sole owner thereof.

It is not clear from the pleadings whether the second patent was in fact transferred to the Generator Co. It was issued on March 25, 1941, three years subsequent to the agreement in question and no recording in the patent office of an agreement relating to the patent exists. (Admission to Heinz Interrog. 34). If, however, Owens gave any grant or assignment of the second patent to the Generator Co., under the 1938 agreement, it came to an end for the very same reasons as patent No. 1. Aside from this, the patent stands in the name of Chas. Owens alone. Plaintiffs contend that they have an interest in the patent because they financed its development. Whatever the merits of this claim, it does not affect Heinz' good faith dealing with Owens.

The Alameda Court determined in its judgment in 1944 (*supra*) that Owens was the owner of the patents. The patents stood in the name of Owens alone. All evidence of record showed it to be Owens' patent.

At all stages of the proceedings in the 1944 action, the Generator Co., was a party. It was represented by counsel, Morris Lowenthal, defendant herein. All stages of the 1954 settlement and vacation of the injunction were on the record and Owens was also represented by Mr. Lowenthal.

There is no dispute as to the material facts affecting Heinz' dealings. From the facts as adduced, the Court finds that Heinz proceeded properly and as a matter of law we would not impose a trust on defendant Heinz.

In addition, the matter of ownership of the patents is settled by the 1944 Alameda suit and is *res judicata* as to the Generator Co. The judgment recites (Findings of Fact and Conclusions of Law IV) that Chas. Owens is the owner of patent No. 1.

The pleadings put in issue the ownership of patent No. 2 and no adjudication finding the Generator Co., as owner of it resulted therefrom. Heinz was an adverse party to Owens and the Generator Co., in that suit.

Therefore, ownership is determined in the prior action and binds the Generator Co. now. *Johnson v. Fontana County F. I. District*, 15 C.2d 380; 2 *Freeman on Judgments*, Sec. 689.

"A former adjudication between the same parties may be either a final determination of the right of the parties or may be an adjudication of certain questions of fact which have been put in issue and decided." *People v. Bailey*, 30 Cal. App. 581 (1916).

Ownership having been adjudicated to be in Owens, Heinz could take, in good faith, absent notice of another interest, all Owens' right, title and interest in the patents. We do not decide here whether Owens, vis-a-vis the Generator Co., had waived rights under the license provisions or had acted in breach of duties owed to the Generator Co. We find no genuine issue of material fact as to Heinz' actions in respect to the patents.

On the question of notice to Heinz of an interest of the Generator Company in the injunction of 1944, no facts need be determined as this issue is purely a legal one.

On the question of destruction of a "property right" by Heinz in dissolving the 1944 injunction, as a matter of law it is clear that the injunction covered only patent rights.

"It is Further Ordered, Adjudged and Decreed that defendant H. J. Heinz Company and its officers, agents and representatives be and they hereby are perpetually restrained and enjoined and forever debarred from asserting any rights or claims based or founded upon or arising out of said original document of November 25, 1941 or any copy thereof, and from asserting or claiming the right or license to build or have built for itself or to maintain or operate vinegar generators of the type, kind or character covered by any Letters Patent of the United States owned by plaintiff Charles



H. Owens, other than the one vinegar generator installed by plaintiffs at the H. J. Heinz Company factory in Berkeley, California."

As to Heinz' knowledge, these rights were owned by Owens alone and concerned patent rights only. This is the only "property right" involved in the Alameda County Superior Court action. Whether Owens, as a fiduciary of the Generator Co., breached any duty to the Company by his actions in the matter is of no consequence in this motion for summary judgment by Heinz. We are concerned only with Heinz' duties. From the foregoing, we find that there existed no facts on which to base a claim of knowledge on the part of Heinz of a breach of duty by Owens to the Company.

Because of the conclusions above the Court has not passed upon herein the further issues raised by Heinz concerning (1) laches and the statute of limitations (2) the lack of a "res" upon which to impose a constructive trust.

THEREFORE, IT IS ORDERED that defendant Heinz' motion for summary judgment under Rule 56(b) be granted and said defendant is hereby dismissed. Counsel for defendant Heinz to prepare judgment accordingly.

Dated: April 7th, 1961.

ALBERT C. WOLLENBERG  
*United States District Judge*

